MISSISSIPPI LAW JOURNAL

125TH ANNIVERSARY COMMEMORATIVE ISSUE

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University of Mississippi School of Law

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THE UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW: 1854-1973

*Parham H. Williams, Jr.**

The School of Law

On Monday, November 6, 1848, The University of Mississippi opened for its first session.[1] The one hundred, twenty-fifth anniversary of that event is currently being celebrated and, as a part of such observance, the School of Law has published this commemorative issue of the *Mississippi Law Journal.* Containing the scholarly contributions of five distinguished Mississippians who are now teaching at as many different law schools,[2] this issue suitably emphasizes the broad-ranging influence of The University of Mississippi School of Law.[3]

Although the fledgling university of 1848 offered no instruction in law, it is clear that lawyers played a dominant role in the initial shaping of the young institution. This influence was evident from the beginning: when the cornerstone of the first building—the Lyceum—was laid on July 14, 1846, the principal address was given by William F. Stearns, a prominent Holly Springs attorney and later the first law professor at Ole Miss.[4] Two years later, the Board of Trustees appropriately selected a

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*Dean of Law, University of Mississippi. B.A. 1953, LL.B. 1954, University of Mississippi; LL.M. 1965, Yale University.

[1]J. Cabaniss, A History of the University of Mississippi 10 (1949) [hereinafter cited as Cabaniss].

[2]Professor Hector Currie, a member of the Ole Miss law faculty from 1948-1963, currently teaches at the LSU Law School; Professor Arthur Custy received the J.D. from Ole Miss, taught here from 1950-1968, and presently teaches at the University of South Carolina School of Law; Professor Samuel M. Davis graduated from the Ole Miss Law School and currently is a faculty member at the University of Georgia School of Law; Professor Robert Childres, an Ole Miss law graduate, taught at the New York University School of Law from 1962-1969, and has taught at the Northwestern University School of Law since that time; and Professor Nathan Levy received the LL.B. degree from Ole Miss and has taught at the University of Connecticut School of Law since 1956.

[3]During the 1972-1973 academic year, a total of 29 University of Mississippi School of Law graduates were teaching at 15 different law schools. Directory of Law Teachers, 1972, Association of American Law Schools (1972).

[4]Cabaniss 8. For a sketch of Stearn's life see Hemleben and Bennett, *A Historical Sketch of the Early Law School of The University of Mississippi: A Newly Found Memoir,* 37 Miss. L. J. 28, 41 (1965).

lawyer, George Frederick Holmes, as the initial president[5] of the new University and then proceeded to appoint lawyers to two of the three faculty positions.[6]

Following the departure of President Holmes in March, 1849,[7] the Board of Trustees unanimously elected another lawyer, Augustus Baldwin Longstreet, as the second president.[8] President Longstreet assumed the helm of a struggling young institution which was a university in name only. A member of his faculty, Professor John Newton Waddell, later observed that prior to the establishment of the Law Department, it was a misnomer to call the institution a university. "We have but a single feature that gives us a claim to the name of a university," wrote Waddell after becoming Chancellor in 1865, "and that is the Professional School (Law School) connected with it."[9]

Cognizant of the need for formalized law instruction in Mississippi,[10] the Board of Trustees requested the legislature in 1854 to establish a chair of law and governmental science at the University.[11] The legislature acted favorably that same year[12] and William F. Stearns was named to the new professorship.[13]

The significance of this event in the development of the University cannot be overemphasized. The establishment of a law department, with its concomitant prestige and influence, elevated the young institution from college status to that of a true university. A member of the Board of Trustees later observed that the "establishment of the Chair of Governmental Science and Law was almost as notable an event in our state history as the initial steps taken six years before in the opening of the

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[5]CABANISS 9. The title was changed to Chancellor in 1859. CABANISS 43.

[6]The two lawyers were Albert Taylor Bledsoe, professor of mathematics and astronomy, and John Millington, professor of natural science. CABANISS 15-17.

[7]Apparently the stress of developing a new institution and controlling the often rowdy students was too great; Holmes abandoned his post several months before the end of the first session. CABANISS 20.

[8]Longstreet, the father-in-law of L. Q. C. Lamar, had been a distinguished lawyer and judge in Georgia before entering the academic world. CABANISS 23.

[9]C. Howry, Rise and Progress of The University of Mississippi School of Governmental Science and Law 8 (unpublished manuscript in the Rare Book Collection of The University of Mississippi School of Law Library).

[10]For a study of the legal training of Mississippi lawyers prior to 1854, see Hemleben and Bennett, *Beginnings of the Legal Profession in Mississippi*, 36 MISS. L.J. 155 (1965).

[11]Meador, *Lamar and The Law at The University of Mississippi*, 34 Miss. L.J. 227, 232-33 (1963).

[12]Ch. 56, [1854] Miss. Laws "An Act to Create in the University of Mississippi a Professorship of Governmental Science and Law."

[13]CABANISS 34.

academic department . . . . [I]t was the beginning of what a university should be . . . ."[14]

The creation of the law chair was seemingly popular and strongly supported by the state bar.[15] The dimensions of this support became evident in 1857 when, by legislative act, a diploma in law from the university was made sufficient evidence of competence to entitle the holder to a license to practice.[16] From the beginning, therefore, the law school has been closely related to the profession and has been traditionally viewed as a unique type of educational institution—one which has important obligations both to the academic world and to the profession which it serves.[17]

The development of the Law Department during the remainder of the 1800's was uneven and was totally interrupted on two occasions: once by war from 1861 to 1866,[18] and again from 1874 to 1877 by the adversities of Reconstruction.[19] Although a second chair of law was created in 1860 and briefly filled by James F. Trotter,[20] it was not occupied after the war and, in fact, not until 1897 was the second professorship again activated.[21]

The postwar history of the Department of Law, though erratic and sometimes discouraging, was marked by a period of luminescence under the leadership of that incredibly able man, L. Q. C. Lamar. It was Lamar

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[14]C. Howry, *supra* note 9, at 11. Charles Bowen Howry, an 1867 graduate of the School of Law, served as a Trustee of the University from 1882-1894. Hemleben and Bennett, *A Historical Sketch of the Early Law School of The University of Mississippi*, *supra* note 4, at 29-30.

[15]The significance of the support from the bar was the subject of comment by Alexander M. Clayton, one of the original University Trustees, who said that "but for the zeal and interest of the profession there would have been no such department for another generation." C. Howry, *supra* note 9, at 24.

[16]Miss. Code, Ch. IX, 151 (1857). This Act has continued in force to the present and is currently Miss. Code Ann. § 8663 (1956).

[17]Recognizing its obligation under the Diploma Privilege Statute, the School of Law in 1972 adopted new curriculum requirements under which law students must take all those courses - ranging from Chancery Practice to Criminal Procedure - which one should have in order to practice law in Mississippi.

[18]Historical Catalogue of the University of Mississippi, 1849-1909, at 61; Meador, *supra* note 11, at 231-32.

[19]Cabaniss 95.

[20]Historical Catalogue, *supra* note 18, at 61. Professor Trotter resigned on October 1, 1861, and did not rejoin the law faculty after the war. Cabaniss 58.

[21]Thomas H. Somerville of the Winona bar was elected to the second law chair in 1897. The office of dean of the department was created at the same time and Garvin D. Shands, who had held the chair of law since 1894, was elected thereto. Historical Catalogue, *supra* note 18, at 62.

who reorganized the Department after the war, who significantly revised and improved the 19th century methods of teaching law, and whose competence and genius have ever since served as the touchstones for excellence in legal education.

Assuming his teaching duties in the autumn of 1866,[22] Lamar quickly comprehended the inadequacies of the "pure lecture" method for teaching law and inaugurated two innovations which continue to constitute the core principles of law teaching today: the Case System and the Moot Court System. Believing that mastery of the law was to be attained through analysis of the actual legal reports rather than by textbooks which gave second-hand information about the law, Lamar in 1867 introduced a method of teaching from adjudicated cases that was in essence the very same as the Case System developed later by Langdell at Harvard.[23] He also established well-defined standards for graduation and instituted a regular system of written examinations on the material assigned or discussed. "In doing so," a biographer has noted, "he broke definitely with the contemporary methods of teaching . . . ."[24]

The second major teaching innovation introduced to the Law Department by Lamar was the Moot Court System. At least as early as the 1867-68 academic year, Lamar was scheduling Moot Court cases on a weekly basis, drafting the hypotheticals himself and usually presiding as judge.[25]

In addition to these revisions of the academic program, Lamar was successful in obtaining recognition of the Law Department as an independent administrative unit within the University. Disciplinary jurisdiction of law students was removed from the general University faculty and vested in the faculty of the Department of Law, viz., in Lamar himself.[26] Lamar further established the independence of the Law Department by securing for it a separate place in the commencement exercises,[27] a procedure which has recently been revived.[28] When Lamar resigned from the

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[22]Meador, *supra* note 11, at 231-32.

[23]W. CATE, LUCIUS Q. C. LAMAR 123 (1935).

[24]*Id.*

[25]Meador, *supra* note 11, at 240.

[26]*Id.* at 244-45.

[27]*Id.* at 245. Apparently the first separate law commencement occurred in 1869, when Wiley P. Harris of the Jackson Bar delivered the address to the law graduates. *Id.*

[28]The School of Law began conducting graduation ceremonies separate from those of the University in 1971. A year later the policy of inviting distinguished lawyers to address the law graduates was revived. The president of the Mississippi State Bar is requested to address the May graduation ceremonies each year and the president of the Young Lawyers Section is annually invited to address the December exercises.

faculty in 1870 to resume his law practice in Oxford, he had successfully shaped the basic features of the Department of Law into a form which would remain substantially unaltered for a hundred years.

The subsequent development of the Law Department has been ably chronicled by Dean Robert J. Farley in an article[29] commemorating the centennial of the University. Dean Farley traces the accomplishments of the several distinguished teachers who filled the chair of law and notes that a period of significant growth occurred under the leadership of Dean Thomas C. Kimbrough. During Kimbrough's tenure, the Department of Law became known as the School of Law, the curriculum was increased from 2 to 3 years, the *Mississippi Law Journal* was established, the School became a member of the Association of American Law Schools and gained approval of the American Bar Association, and a new building was completed and occupied.[30]

With the advent of World War II, most of the faculty and students entered military service and only through extraordinary efforts was Dean Kimbrough able to keep the School open. When Bob Farley was appointed Dean in February, 1945, he faced many of the problems which confronted Lamar in 1866: the academic program had been disrupted; the faculty was scattered, and there were few students.[31] By virtue of his administrative skills and the strength of his personality, Farley was able to reorganize the School and to attract a faculty which can only be described as outstanding.[32]

Rapid enrollment growth occurred under Farley's leadership and significant progress took place in all areas of the law program. The admission standards were increased to require a bachelor's degree from an accredited institution, the minimum requirement for the bachelor of laws degree was increased from 78 to 82 hours,[33] faculty salaries were improved, and in 1959, an annex to the law building was completed and occupied. A significant development during this period was the introduction into the curriculum of practice-oriented courses such as Oil and Gas, Workmen's Compensation, Labor Law, and Administrative Law.[34] The School continued to enjoy a close working relationship with the profes-

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[29]Farley, *The School of Law - Since 1854,* 20 Miss. L.J. 249 (1949).

[30]*Id.* at 250.

[31]*Id.* at 251.

[32]The faculty by 1949 included John Fox, Roscoe Cross, Hector Currie, William N. Ethridge, Jr., J. W. Bunkley, Jr., Ford Hall, W. L. McLane, and Walter Dunham as full-time teachers. Miss Corinne Bass was Librarian and L. G. Fant, Jr., L. C. Andrews, and Bramlett Roberts were part-time instructors. *Id.* at 252.

[33]*Id.* at 251.

[34]*Id.*

sion and in 1954, Dean Farley was honored with election to the presidency of the Mississippi State Bar.[35] Upon his retirement in 1963, Farley could reflect with justifiable satisfaction upon the growth and progress of the School of Law under his leadership. In statistical terms, the enrollment had quintupled, the faculty had grown twofold, the library holdings had doubled, and the building had been substantially enlarged.[36] More importantly, the reputation of the School as an institution of academic strength and integrity had been firmly established. His leadership during those often troubled years was critically important to the School and, as John Fox later observed, in his professional accomplishments as dean and in the strengths and graciousness of his personal life, Farley ranked with the incomparable Lamar.[37]

The School continued to make substantial progress under the deanship of Joshua M. Morse, III. A graduate program in law was inaugurated in 1965 and the degrees of LL.M., M.C.L. and J.S.D. were offered. The Bachelor of Laws degree was changed to the Juris Doctorate in 1966 and the curriculum was substantially enlarged. Research efforts were increased and the Legal Institute of Agricultural and Resource Development was established in 1966.

Morse was succeeded by Joel W. Bunkley, Jr., in 1969, and continuing progress was achieved. A legal intern program was established and, at the time of Dean Bunkley's tragic death in September, 1971, the enrollment had reached an all time high of 654.

The University of Mississippi Law Center

In 1854, the University responded to the legal education needs of Mississippi by creating the Department of Law. Throughout the succeeding 119 years the University has continued to meet such needs by enlarging, revising and improving the program of law instruction. Today, these needs are more diverse and complex than ever before and include (1) academic training for prospective lawyers, (2) a broadly-based research service for the legislature and other governmental agencies, (3) clinical training for law students, (4) graduate legal education for lawyers who desire to specialize in certain areas such as taxation, and (5) continuing legal education for attorneys, judges, and court officials.

The model which will best accomplish these diverse tasks is the Law Center, an institution which groups related legal education functions in-

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[35]Fox, *Dean Robert J. Farley*, 35 Miss. L.J. 1, 3 (1963).

[36]*Id.* at 3.

[37]*Id.* at 4.

to an integral unit. The Law Center thus operates in much the same manner as the modern Medical Center, combining a number of kindred activities in order to provide more efficient and more extensive service. To meet Mississippi's expanding needs for legal education services, The University of Mississippi Law Center was established on July 1, 1973. The principal elements of the Center are: (1) the School of Law, (2) the Mississippi Law Research Institute, (3) the Criminal Justice Center, and (4) the Institute of Continuing Legal Education. Let me sketch these four functions as I see them developing during the next 25 years.

The first and most important element is the School of Law. The primary purpose of the Law Center is to train young Mississippians to practice law in Mississippi and emphasis will accordingly be placed on the academic program of the School of Law. The student body will be limited in size and will be selected on the basis of rigorous entrance requirements. Preference will be accorded Mississippians in this selection process and non-resident admissions will be severely restricted. This process of careful selection, coupled with demanding academic requirements, will produce a sufficient number of highly qualified new lawyers to meet the steadily growing demand for legal manpower in our state. Continuing efforts will be made to increase the holdings in the Law Library and to enlarge the faculty so as to achieve the essential student/faculty ratio of 20 to 1. The curriculum will emphasize training in trial advocacy and will include an expanded clinical education program.

The second major element of the Law Center is the Mississippi Law Research Institute. This division combines the present Legal Institute of Agricultural and Resource Development, the Sea Grant Program, the Legislative Research Service, and other research programs. The Institute is dedicated to providing broad-ranging research service to the legislature, to state government agencies, and to the academic program.

The third major element of the Law Center is the Criminal Justice Institute. Designed to provide high quality training at every level of the criminal justice system in Mississippi, this division incorporates the Law Intern Program, the Mississippi Judicial College, the Criminal Justice Information Center, and the Criminal Justice Research Program.

The fourth major program element is the Institute of Continuing Legal Education. Many areas of the law are dynamic, with changes occurring so rapidly that the practitioner often has difficulty keeping abreast of the new cases. Accordingly, in cooperation with the Mississippi State Bar, the Law Center will provide in-depth educational programs, ranging in duration from 1 day to 6 weeks, at various locations in the state.

The establishment of The University of Mississippi Law Center is a direct response by the University to the present-day legal education needs of the state. The Law Center, combining the best of our resources, provides the structure for meeting those needs as they evolve during the last quarter of the 20th century.

RESTATEMENT (SECOND) AND THE LAW OF CONDITIONS IN CONTRACTS

Robert Childres and Bruce Dennis Sales***

Introduction

The American Law Institute (ALI) should withdraw its approval of *Tentative Draft No. 7 of Restatement (Second) of the Law of Contracts* [*Draft*]. The law of conditions contained in that draft can only confuse the profession, foment litigation, and promote unjust resolution of controversy. The extent to which the *Draft's* law of conditions might control decisions is precisely the extent to which it would cause injustice. It does not restate the law; it rewrites it in a regressive way. It is internally inconsistent and externally invalid. These are strong statements, but not over-strong, especially since the *Draft* threatens to have an impact on the law and the economy for perhaps a half-century. For this reason, its errors have ominous importance. To evaluate these assertions the reader must consider a detailed discussion of the Restatement.

Contract law has historically divided terms into conditions and promises. The effect of this classification often has significant consequences.

> When a disputant relies on a contract default as affecting his duties, contract law has traditionally asked whether there was a default on a condition. The purpose of this question is to determine whether the effect of the default is to be restricted to its materiality in the circumstances. If restricted to materiality, it was a default on a promise; but if and only if the default is to be decisive regardless of its materiality, it must be characterized as a default on a condition.[1]

The failure of a condition, even though not material, might cause forfeiture of all rights under the contract.

It has been argued that condition law should be eliminated and all terms treated as promises, since condition law (a) promotes legal gamesmanship by encouraging bad faith litigation with claims which are only technical and (b) forces courts to employ numerous repealers so that they can enforce, even though covertly, good faith contract performance.[2]

---

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[1] Childres, *Conditions in the Law of Contracts*, 45 N.Y.U.L. Rev. 33, 35 (1969).

[2] *Id.*

Instead of adopting this approach, the ALI has chosen to reindorse a highly traditional version of conditions in contract law. This paper will analyze in detail (1) the various positions in the *Draft,* (2) the illustrations offered to enlighten those positions and (3) the cases which are listed as supportive of the proposed restated law. The analysis will have a dual perspective, focusing on both the internal consistency of the *Draft* and its external validity.

A brief definition of these criteria is in order. To evaluate internal consistency we ask the following questions of our data: (1) Is the *Draft* so worded as to produce clear lines of demarcation for its application?; and (2) when the various sections of the *Draft* are considered together will they be mutually exclusive and consistent, so that their respective applications will not overlap, on the one hand, nor leave voids in coverage, on the other? Underlying both questions is the concern about whether the restated law will be sufficient on its face to insure orderly and determinant administration by both the contracting parties and the judiciary.

The test of external validity compares the presented illustrations to their respective statements of law and asks whether the law does indeed determine each illustration's outcome as claimed. It also requires an inquiry into the restated law's correlation with the cases cited as support for it.

With these criteria as tools, it is possible to subject the *Draft* to a critical and detailed analysis and at the same time take a fresh look at the role of conditions in contract law. The *Draft* is composed of six sections, 250-255. A detailed analysis of each is in order.

Sections 250 And 251

> §250. CONDITION DEFINED. A condition is an event, not certain to occur, which must occur, unless excused, before performance under a contract becomes due.[3]
>
> §251. EFFECTS OF THE NON-OCCURRENCE OF A CONDITION. (1) Performance of a duty subject to a condition cannot become due unless the condition occurs or is excused. (2) If the condition has not been excused, its non-occurrence discharges the duty when the condition can no longer occur. (3) The non-occurrence of the condition is a breach by a party only if he is under a duty that the condition occur.[4]

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[3]Restatement (Second) of Contracts § 250, at 34 (Tent. Draft No. 7, 1972) [hereinafter cited as Draft].

[4]*Id.* § 251 at 42.

These first two sections demonstrate that the ALI has decided to maintain the rule that certain events may be operative beyond their materiality. The 19th century's elevation of freedom of contract as the ruling contract policy is without question responsible for the retention of this body of law. According to the *Draft*, "[t]he policy favoring freedom of contract requires that, within broad limits . . . the agreement of the parties should be honored even though forfeiture results."[5]

Although this language appears to be absolute, the *Draft* notes that a court can still avoid the imposition of such a stringent result by resort to any one of numerous exceptions.[6] These include unconscionability of a contract term,[7] the requirement of good faith and fair dealing in the performance and enforcement of contract terms,[8] interpretation of the term as a promise instead of a condition,[9] waiver,[10] discharge,[11] acceptance of performance in spite of the non-occurrence of the condition,[12] rejection of performance following the non-occurrence of the condition accompanied by an inadequate statement of reasons,[13] repudiation of the conditional duty,[14] a manifestation of an inability to perform the conditional duty,[15] impossibility,[16] and excuse to avoid extreme forfeiture.[17] These various repealers will work to prevent the *Draft's* law of conditions from having any significant impact on decisions when the issue is well litigated. They are necessary, of course, if the *Draft's* basic position is to have even the most tenuous correlation with contemporary contract decisions.[18]

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[5]*Id.* § 253, comment *b* at 57.

[6]*Id.* § 251, comment *b* at 43-44.

[7]*Id.* § 255; RESTATEMENT (SECOND) OF CONTRACTS § 234, at 107 (Tent. Draft No. 5, 1970), reads: "If a contract or term thereof is unconscionable *at the time the contract is made* a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result." (emphasis added).

[8]RESTATEMENT (SECOND) OF CONTRACTS § 231, at 92 (Tent. Draft No. 5, 1970), reads: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

[9]*See* DRAFT § 251, comment *a* at 42 which states that "[W]here discharge would produce harsh results . . . [it] may be avoided by rules of interpretation (§§ 252-254) . . . ."

[10]RESTATEMENT (SECOND) OF CONTRACTS § 88, at 111 (Tent. Draft No. 2, 1965).

[11]DRAFT § 251, comment *b* at 43.

[12]RESTATEMENT (SECOND) OF CONTRACTS § 270 (Tent. Draft No. 8, 1973).

[13]*Id.* § 272.

[14]*Id.* § 279.

[15]*Id.* § 275.

[16]DRAFT § 251, comment *b* at 44.

[17]*Id.* § 255.

[18]Childres, *supra* note 3, at 35.

Sections 250 and 251 are each accompanied by nine illustrations to indicate the workings of their respective rules. Surprisingly, a close look at these 18 illustrations reveals that only three raise real conditions problems. Eight deal with operative facts whose materiality in the circumstances renders moot any conditions question. The result would be the same whether these were called conditions or promises. This group consists of numbers 1, 4, 5, 6, 7, and 9 (if it involves an enforceable promise) to section 250 and numbers 1 and 2 to section 251. In three other illustrations, the question is semantical only in the sense that there is no suggestion of any effect on a decision. These are numbers 2, 3, and 8 to section 250. Finally, excuse removes the question in three, numbers 3, 4, and 5 to section 251.

Let us now turn to the three illustrations which raise conditions questions, illustrations 6, 7, and 9 to section 251. These have a common origin which the *Draft* rather strangely fails to report, *Bornmann v. Tooke*.[19] It is an old English case not much cited anymore, if it ever was, because it is thought of as simply following the much better known *Constable v. Cloberie*.[20] That these two central sections offer as their only illustrations of operative conditions a kind of transaction non-existent today is deplorable but, perhaps, instructive of the *Draft*. The illustrations are:

> 6. A, a shipowner, promises to carry B's cargo on his ship to Portsmouth. B promises to pay A the stipulated freight on condition that A's ship sail directly there on its next sailing. A's ship carries B's cargo to Portsmouth, but puts into port on the way. Since carrying B's cargo directly to Portsmouth is a condition of B's duty, no duty to pay arises, and since the condition can no longer occur, B's duty is discharged. Since A is under no duty to carry B's cargo directly to Portsmouth, however, his failure to do so is not a breach.[21]
>
> 7. The facts being otherwise as stated in illustration 6, A promises to carry B's cargo on his ship directly to Portsmouth on its next sailing. Since carrying B's cargo directly to Ports-

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[19]170 Eng. Rep. 991 (K.B. 1808).

[20]81 Eng. Rep. 1141 (K.B. 1626). Corbin does not cite *Bornmann* in his treatise, *see* 7 A. CORBIN, CONTRACTS 51 (1951), although he discussed *Constable*. *See* 3A A. CORBIN, CONTRACTS 25 (1951). Neither case seems very important in England anymore. Neither, for example, is among the hundreds or thousands of cases cited in CHITTY, CONTRACTS (23d ed. 1968). Although *Bornmann* is a principal case in E. PATTERSON, G. GOBLE & H. JONES, CASES AND MATERIALS ON CONTRACTS 833 (4th ed. 1957), the successor volumes to that book omit it. *See* H. JONES, E. FARNSWORTH & W. YOUNG, CASES AND MATERIALS ON CONTRACTS (1965); E. FARNSWORTH, W. YOUNG & H. JONES, CASES AND MATERIALS ON CONTRACTS (2d ed. 1972).

[21]DRAFT at 46.

mouth is a condition of B's duty, no duty to pay arises and, since the condition can no longer occur, B's duty is discharged. Since A is under a duty to carry B's cargo directly to Portsmouth, his failure to do so is also a breach.[22]

9. The facts being otherwise as stated in illustration 6, B refuses to pay the freight without knowing that A's ship has put into port on the way. B's refusal is not a breach since his duty is discharged.[23]

The ALI's conclusion in each illustration is the more astonishing since the 17th and 19th century judges on whose opinions the illustrations are based reached conclusions contrary to those suggested here. Lord Ellenborough defended his decision thusly: "To hold that any short delay in setting sail or trifling departure from the direct course of the voyage would entirely destroy the plaintiff's right to be remunerated for transporting the cargo, would indeed be going *inter apices facti (a).*"[24] Very clearly, Lord Ellenborough's view is that the events should not be operative beyond their materiality in the circumstances. It is this view, of course, that undercuts the very notion of a law of conditions.

Even if these illustrations were without their remarkable, unreported origin, they have nothing to recommend themselves to contemporary contracts students or anyone else. What, for example, is that most important fact in any such controversy? Might it not be the present status of the contract subject, *B's* cargo? The *Draft* treats this fact as irrelevant, allowing us to conclude that it would support *B's* position in *Bornmann.* It ignores the fact that he had his cargo, but wished to avoid paying over 2,000 pounds for freight because *A's* conduct cost him a few extra pounds for insurance. To defend that kind of position today is absurd and offensive, but that is precisely what the ALI has chosen to do.

Illustration 9 allegedly applies section 251 (3).[25] Its thrust is more readily seen if one assumes, as the illustration must, that *B's* refusal to pay would have been a breach but for the unknown port visit. It makes clear that the unknown port visit was not the reason *B* declined to pay, that it was an after-thought defense and merely a technical contention. Yet the illustration ignores all this and requires a decision in *B's* favor.

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[22]DRAFT at 47.

[23]*Id.*

[24]170 Eng. Rep. at 992.

[25]There is an additional failure to disclose the origin of this illustration and the rule upon which it is based. It is in fact section 278 of the *Restatement (First) of Contracts (1932),* which reads: "The failure of a condition to exist or to occur or the actual or prospective failure to perform a return promise which would prevent a promisor's duty from arising or would discharge it if he knew of the facts, has the same effect although he is ignorant of them." This section is amply criticized in Childres, *supra* note 3, at 44-46.

These three illustrations, the only ones relevant to the ALI's basic statement of its law of conditions, should be weighed with care. Under no set of additional hypotheses would any of them be decided today in the way the *Draft* suggests. Equally objectionable is their high formality. Though we must assume it, we are not even told that *B* has his goods, which would be the central question in any such controversy today.

SECTION 252

HOW AN EVENT MAY BE MADE A CONDITION. An event may be made a condition either by the agreement of the parties or by a term supplied by the court.[26]

Section 252 is the first of four sections which acknowledge that whether an event is to be labeled a condition must often be left to the discretion of the court. For example, comment *a* to this section notes: "No particular form of language is necessary to make an event a condition. . . ."[27] Keeping in mind the very different consequences a label of condition as opposed to promise may have, the important question becomes: what is to guide the court in the exercise of its judgment?

According to the *Draft,* if the parties agreed to a "condition" a court would "be able to determine this fact by the process of interpretation."[28] At the same time, however, the *Draft* says that the court may supply a term and thus make an event a condition.[29] Comment *c* to this section notes that when the parties have omitted a term essential to the determination of their rights and duties the court may engage in construction of the contract.

The *Draft* thus claims that existing contract terms are interpreted by the courts, while necessary omitted terms, presumably among other things, are supplied by construction. It is essential that the *Draft* maintain this distinction in some form, since the two processes are radically different. "In interpreting agreements, one is attempting to determine intention. In construing them, one is attempting to prevent or to resolve controversies by asking how detached people would handle them in light of good faith dealing according to reasonable standards. . . . Construction has nothing to do with intention, express or implied."[30] Moreover, construction turns crucially on the issue of materiality.[31]

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[26]DRAFT § 252, at 49.

[27]*Id.* § 252, comment *a* at 49.

[28]*Id.*

[29]*Id.* § 252, comment *c* at 52.

[30]Childres, *supra* note 3, at 36.

[31]For one thing, it is helpful in analysis and description to have terminology that reflects the two distinctive processes, sometimes called "interpretation" and "construction," that give rise to conditions . . . For another, to

Yet the *Draft* does not present the processes in an operationally distinguishable way. In the comments to section 252 we find that interpretation may also be used when a term is not present: "An intention to make a duty conditional may be manifested by the general nature of the agreement, as well as by specific language. . . . [as] determined by the process of interpretation."[32] This overlap mirrors a similar confounding of the processes of interpretation and construction in *Restatement (First) of Contracts*.[33] The courts, of course, have and presumably will continue, as long as conditions persist, to use this confusion to render the law of conditions as little relevant as possible. The validity of this last assertion may be seen by looking at the illustrations and cases cited in support of section 252.

The reporter's note to comment *a* of the section begins by citing *In re Carter's Claim*[34] as authority for the proposition "[t]hat the process of interpretation governs the requirement of conditions."[35] That court does indeed begin by saying "The resolution of this controversy depends upon the interpretation of certain portions of the . . . written agreement."[36] But it goes on to conclude that the *"construction"*[37] arrived at below (referring to an arbitrator's ruling) was correct. The *Draft's* reliance for clarification on such a level of confusion offers only discouragement.

The first six illustrations in this section are supposed to enlighten the process of interpretation. Illustration 1, based upon *Partlow v. Mathews*,[38] claims to support the proposition that particular forms of

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the extent that the parties have, by a term of their agreement, clearly made an event a condition, they can be confident that a court will ordinarily feel constrained strictly to apply that term, while the same court may regard itself as having considerable latitude in tailoring a similar term that it has itself supplied.

DRAFT § 252, comment *c* at 52-53.

[32] *Id.* § 252, comment *a* at 49.

[33] An intention that a promise shall be conditional on the occurrence of an . . . event may be manifested with varying degrees of clearness. When expressed in unmistakable language, the hardship caused by enforcing the requirement is generally immaterial. *Where, however, language less clearly makes a promise conditional, a liberality of interpretation is permissible* which depends to some extent on the result of giving effect to it as such.

RESTATEMENT (FIRST) OF CONTRACTS § 258, comment *b* (emphasis added). "Liberality of interpretation" grossly offends the distinction between interpretation and construction. Only construction may be liberal, or illiberal for that matter.

[34] 390 Pa. 365, 134 A.2d 908 (1957).

[35] DRAFT, Reporter's Note § 252, comment *a* at 54.

[36] 390 Pa. 365, 134 A.2d 908, 910 (1957).

[37] *Id.*, 134 A.2d at 915.

[38] 43 Wash. 2d 398, 261 P.2d 394 (1953).

expression are not necessary to make an event a condition. The decision is surely wrong, for even a brief look at the case reveals that the court elevates form over substance and reaches an unjust result. In the case, the plaintiff represented a professional partnership which owned and operated a medical clinic. The partnership agreement provided that (1) in the event the defendant presented written notice of his intent to withdraw and (2) the partnership requested him to revoke his notice prior to its effective date and (3) he refused, then he should not engage in his professional practice within a 25 mile radius of the city. On November 1, 1951, the defendant presented written notice of his intent to withdraw from the partnership. On November 20 the partnership gave defendant a letter requesting that he rescind his withdrawal notice. On January 16, one month before the first withdrawal notice was to take effect, he submitted a second withdrawal notice which was identical to the first. The partnership did not respond to this second notice, believing the first reply to be sufficient. The court ruled that since the partners did not request that the defendant rescind his second notice, the promise not to compete was inoperative. Although there was a finding of fact that the defendant had no intention of cancelling his withdrawal, even if the partners had sent the second notice, and thus that the "breach" was immaterial and a technical defense only, the court nevertheless held the failure to object a second time to be crucial.

Even on the court's premises, it is arguable that the seeking of intention should have led to a contrary conclusion. The true intent of the parties was that the litigants both have notice of their respective wishes. The defendant's letters were identical. The second was sent fully one month before the first was to take effect. Not to allow the first letter from the partners to apply to both of the defendant's letters is to encourage more legal gamesmanship and thus increase litigation. That the defendant was engaging in legal gamesmanship and hoping to win on a purely technical contention is amply illustrated by the fact that after the three month waiting period was up on the defendant's second withdrawal notice, he went to the head of the Executive Committee of the partnership and told him "that the ninety days had elapsed and that there was nothing the partnership could do about the restrictive clause. . . . 'He stated that is why he hadn't attended the meetings and made it a point not to have a discussion with me [the Head of the Executive Committee] for fear that I would make an official request for him to rejoin the clinic. . . .' "[39]

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[39]*Id.*, 261 P.2d at 397.

Illustration 3[40] involves construction, although it purports to illustrate interpretation. In the illustration, *A* sells an automobile to *B* for which *B* promises to pay $5,000 "on demand." *A* then sues *B* for the money without first making a demand. The *Draft* concludes *A* can recover: "Since no useful purpose would be served by requiring that a demand be made before suit, a demand by A is not a condition of B's duty."[41] This solution resolves the dispute in light of reasonable standards, not intention.[42]

A case cited in support of Illustration 3 also merits comment. The court in *First National Bank v. Story*,[43] said that the intention of parties, that is, interpretation, should govern "because the law implies a promise . . . ."[44] As the *Draft* itself notes, "implied in law" is an archaism synonymous with construction, not interpretation.[45] Why this old piece of confusion should live on in contracts is an unfortunate mystery.[46]

Illustration 4 is new, and was suggested by the well-known case of *De Freitas v. Cote*.[47] In the illustration, *A* contracts to sell a house to *B* for $50,000, with the provision, "[t]his contract is conditional on approval by *X* Bank of *B's* pending mortgage application."[48] *B* fails to get the mortgage but raises the money from other sources. Does *A* have to perform? The illustration concludes that the approval by *X* bank was not a condition of *A's* duty, holding that the intention of the parties was to protect *B* in case he did not have the financing to complete the transaction. While this is perhaps probable, the facts are too sparse to make it clear. More importantly, the facts are much too sparse to

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[40]Illustration 3 is based on RESTATEMENT (FIRST) OF CONTRACTS § 264, Illustration 1 at 380. Illustration 2, which is not discussed here because it concerns an entirely implausible controversy, comes from RESTATEMENT (FIRST) OF CONTRACTS § 262, Illustration 2 at 377.

[41]DRAFT § 252, Illustration 3, *supra* note 2, at 50.

[42]The desirability of the decision in this example is obvious. However, by claiming the example is of interpretation, the *Draft* creates more confusion and invites unsatisfactory decisions. *See, e.g.*, Inman v. Clyde Hall Drilling Co., 369 P.2d 498 (Alas. 1962), and the discussion of that case in Childres, *supra* note 3, at 33-35, 55, 56.

[43]200 N.Y. 346, 93 N.E. 940 (1911).

[44]*Id.* at 943.

[45]DRAFT § 252, comment *c* at 52.

[46]Two other opinions cited to Illustration 3, Arthur Fulmer St. Louis Inc. v. Auto-Re-Nu-Inc., 177 Neb. 671, 131 N.W.2d 89 (1964) and Texas Water Supply Corp. v. Reconstruction Fin. Corp., 204 F.2d 190 (5th Cir. 1953), have nothing to do with interpretation.

[47]342 Mass. 474, 174 N.E.2d 371 (1961).

[48]DRAFT § 252, Illustration 4 at 50.

claim this is a matter of interpretation, for the only real evidence of intention is "[t]his contract is conditional . . ." Thus, the contract on its face says that both parties' duties are conditional, not merely the buyer's. Since the court in interpretation is supposed to be restricted to the intention of the parties, the process of reaching the illustration's result would better be characterized as construction.

In *DeFreitas* itself, a real estate broker sued for his commission. The contract followed that in the illustration. The seller refused to proceed with the deal until his contract with the real estate broker had terminated, hoping to avoid paying the commission. After expiration he called the buyer and offered to perform.[49] In court, however, the seller argued that he had not performed because the buyer's mortgage application had not been approved. Holding for the broker and obviously aware that the seller was lying, the court said that the "instrument must be construed according to the parties' intent."[50] The court either confused the processes of construction and interpretation, or it was consciously construing the document. In either event, it is clear the illustration and the case perpetuate confusion rather than clarify anything.[51]

Illustration 5 purports to demonstrate that interpretation may alter the requirements of a condition so as to avoid an option to cancel. Talk of interpretation here again undermines the distinction between interpretation and construction for this obviously should be characterized as construction. The illustration is based upon *Ferguson v. Phoenix Assurance Co.*[52] That case involved a claim against the insurance company based on the burglary of a safe. The relevant term in the contract defined "safe burglary" as "the felonious abstraction of insured property . . . *provided such entry shall be made by actual force and violence, of which . . . there are visible marks . . . upon the exterior of . . . all . . . doors* of such a vault. . . ."[53] The thief chose to manipulate the lock on the outer door of the safe, while forcing the lock on the inner door. Thus only the inner door showed marks of force and violence. The clause was construed, not interpreted. In the

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[49]During this time the buyer, unaware of the seller's plan, had bought elsewhere because he thought the seller would not perform.

[50]342 Mass. 474, 174 N.E.2d at 373 (1961).

[51]This is not to say that the decision was not just. It was. But the road to that decision was necessarily difficult and cumbersome because of condition law.

[52]189 Kan. 459, 370 P.2d 379 (1962).

[53]189 Kan. 459, 370 P.2d at 381.

court's words, "[t]he only dispute [is] the construction of the insurance policy. . . ."[54]

In Illustration 6, *A* agrees to sell a house to *B* for $50,000. *B's* duty is said to be conditional upon his receiving described financing from *X* bank. When this fails, *A* offers to take a purchase-money mortgage on the same terms. Does *B* have to perform? The illustration says the language is ordinarily interpreted so that the condition occurs only if *B* got the money from the bank. Again, this is no matter of interpretation, as the cases referred to by the ALI make clear.[55] Of four such cases, only one, *Kovarik v. Vesely*,[56] had facts similar to those of the illustration. There, the court decided that *B* had to agree to *A's* offer of the purchase-money mortgage. The decision was not couched in interpretation or condition language but rather in construction, asking whether the buyer's position would be materially altered by the purchase-money mortgage.[57]

Materiality also ruled in another of the four cited cases, *Simms Co. v. Wolverton*,[58] where the agreement provided merely that obtaining a mortgage was a condition of the offer. The buyer was unable to get a mortgage although one bank offered to give the seller a mortgage if the seller became the mortgagor. The seller then wished the buyer to become a sub-mortgagor. The court ruled that the buyer did not have to accept this offer because it would materially alter the position he had contracted to assume.[59]

The final two illustrations to section 252, numbers 7 and 8, are recognized to be straightforward matters of construction.[60] It might have

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[54]*Id.*

[55]*See* DRAFT, Reporter's Note § 252, comment *b*.

[56]3 Wis. 2d 573, 89 N.W.2d 279 (1958).

[57]The court said:

> We now turn to the issue of the proper construction of the contingency clause of the contract.
>
> [Buyers'] testimony stated no reason of any kind with respect to why the [buyers] preferred having the mortgage loan come from the [bank] rather than from the [seller]. Neither was there any claim advanced in such testimony that at the time of making the contract it was of material consequence to the [buyers] that the loan be obtained from the [bank] rather than from some other source.

3 Wis. 2d 573, 89 N.W.2d at 284-85 (1958).

[58]232 Ore. 291, 375 P.2d 87 (1962).

[59]The other two cases referred to in connection with Illustration 6 are of such little interest that both were decided with memorandum opinions. Marino v. Nolan, 24 App. Div. 2d 1005, 266 N.Y.S.2d 65 (1965), *aff'd mem.*, 18 N.Y.2d 627, 219 N.E.2d 291 (1966); Glassman v. Gerstein, 10 App. Div. 2d 875, 200 N.Y.S.2d 690 (1960).

[60]It is interesting to note that Illustration 7 was treated as an example of interpretation in section 262, Illustration 3, to the *Restatement (First) of Contracts.*

been helpful in clarifying matters if the ALI had produced in the first six illustrations clear examples of interpretation in the law of conditions. But it did not. We would like to think this failure is due to the impossibility of the task, but it is sufficient to note that the ALI has not done what it purports to do.

SECTION 253

> STANDARDS OF REFERENCE WITH REGARD TO CONDITIONS. (1) In resolving doubts as to whether or not the agreement makes an event a condition of an obligor's duty, and as to the nature of an event that is made a condition of his duty, an *interpretation* is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risk. (2) When it is doubtful whether the agreement (a) both makes an event a condition of an obligor's duty and imposes a duty on the obligee that the event occur, or (b) only makes the event a condition of the obligor's duty, or (c) only imposes a duty on the obligee that the event occur, the last *interpretation* is preferred if the event is within the obligee's control and he has undertaken other duties under the contract. (3) In case of doubt, an *interpretation* under which an event is a condition of an obligor's duty is preferred over an *interpretation* under which the non-occurrence of the event is a ground for discharge of that duty after it has become a duty to perform.[61]

Section 253 is supposed to guide the court when doubt exists as to whether the parties intended that an event be a condition or a promise. The section claims that only the process of interpretation is to be used and thus, reference should be made to the intent of the contracting parties. Yet the section is inconsistent and confused on its face. Consider subsection (1): "In resolving doubts . . . an interpretation is preferred that will reduce . . . risk of forfeiture."[62] To be concerned with doubts and reducing the risk of forfeiture is not to be concerned with what the parties intended. The focus is beyond intent. The process spoken of is construction.

At the risk of being repetitive, it must be remembered that the court's powers of construction enable it to bring in those considerations of justice which most often undercut the law of conditions. Specifically, the principal reason to avoid forfeiture is simply that the harsh result is not commensurate with the materiality of the breach. Indeed the

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No explanation is given for the change made in the *Draft*. It is an example of the internal inconsistency shown in the condition sections of the *Draft*.

[61] DRAFT § 253, at 56 (emphasis added).

[62] *Id.*

Draft admits this fact although it confuses the remedy: "Where discharge would produce harsh results, [it] may be avoided by rules of interpretation. . . ."[63] Moreover, we have an internal inconsistency, which is, again, an apparently deliberate confusion of the processes of interpretation and construction. For the ALI repeatedly to offend in such an elementary way the intelligence and integrity of the law is hardly to be believed.

The first illustration to section 253 is based upon *Thos. J. Dyer Co. v. Bishop International Engineering Co.*[64] In the illustration, *A*, a general contractor, contracts with *B*, a subcontractor, for the plumbing work on a construction project. *B* is to receive $100,000, "'no part of which shall be due until five days after Owner shall have paid Contractor therefor.' "[65] *B* does the plumbing work, but the owner becomes insolvent and fails to pay *A*. The illustration concludes that *A's* duty to pay *B* is unconditional and *A* must pay after a reasonable time. In *Dyer*, the court relied on construing the contract in light of reasonable business standards in order to reach this result. As the court said: "Accordingly, we come to the crucial issue in the case, namely, whether . . . paragraph 3 . . . is to be construed as a conditional promise to pay. . . ."[66]

The *Draft*, however, does not restate this law, it rewrites it. According to section 253(1) the result is reached because (1) there was doubt as to whether the term was a condition, (2) the event was not in the obligee's control and (3) the circumstances did not indicate that the obligee had had assumed the risk of nonpayment if the owner failed to pay the contractor. This is an intolerable complication, confusion, and worst of all, distortion of a decent, straightforward decision and opinion.

The two other cases cited in the note to this illustration also frame the issue as one of construction.[67] The analysis in all these cases centers around a consideration of the reasonable and good faith business practices of the community, a hallmark of construction.

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[63] *Id.* § 251, comment *a* at 42.

[64] 303 F.2d 655 (6th Cir. 1962).

[65] DRAFT § 253, Illustration 1 at 59.

[66] 303 F.2d at 659.

[67] Mascioni v. I. B. Miller, Inc., 261 N.Y. 1, 184 N.E. 473 (1933); Mignot v. Parkhill, 237 Ore. 540, 391 P.2d 755 (1964). Although these opinions discuss construing to find intent, indicating the confusion in this area, the courts' reliance on the standards of the rest of the business community establish the fact that they were not seeking intent according to the traditional procedures of interpretation; the courts were construing the agreements.

Construction to do justice is also the basis of the court's decision in *North American Graphite Corp. v. Allan*,[68] upon which Illustration 2 is based.

> We must seek the intent of the parties as to the meaning of the contract. . . . The parties having neglected to provide for such a contingency, the law in this, as in many other cases, supplies the omission by implying such a promise as is necessary to do justice between the parties. . . .[69]

The assumption that Illustration 2 concerns interpretation is, then, obviously not founded in the case from which it is taken. Nor is it clear that there would be any relevant intention. Illustration 2 reads:

> A, a mining company, hires B, an engineer, to help reopen one of its mines for $10,000 to be payable as soon as the mine is in successful operation. $10,000 is a reasonable compensation for B's service. B performs the required services, but the attempt to reopen the mine is unsuccessful and A abandons it. A is under a duty to pay B $10,000 after the passage of a reasonable time.[70]

Why is *A* under this duty? The *Draft* must say intention, but a fair reading indicates nothing whatever on the question of what the parties, or either of them, intended the payment to be in the event the mine failed. If the question is what they would have intended had they thought about it, we are in fact asking what they should have intended, and that is a matter of construction.

Illustration 3 presents similar facts. It reads:

> A, a mining company, contracts with B, the owner of an untested experimental patented process, to help reopen one of its mines for $5,000 paid in advance and an additional $15,000 to be payable as soon as the mine is in successful operation. $10,000 is a reasonable compensation for B's services. B performs the required services, but because the process proves to be unsuccessful, A abandons the attempt to reopen the mine. A is under no duty to pay B any additional amount. In all the circumstances the risk of failure of the process was, to that extent, assumed by B.[71]

The illustration concludes that *A* is under no duty to pay *B* the $15,000 because *B* assumed the risk of failure in the process. Since the as-

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[68] 184 F.2d 387 (D.C. Cir. 1950).

[69] *Id.* at 390. The Court quoted this language from the famous old case of DeWolfe v. French, 51 Me. 420, 421 (1864), *quoted in* 5 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 799, at 817 (3d ed. W. Jaeger 1961).

[70] DRAFT § 253, Illustration 2 at 59.

[71] *Id.* § 253, Illustration 3 at 59.

sumption of risk is a criteria only in section 253(1), it must be assumed that the *Draft* intends that subsection to apply. If that is the case, then one must also assume that the event was not within B's control, since the dispute would have been solved on that basis according to the *Draft's* systematics and the illustration chooses not to raise the issue. But for the *Draft* to simultaneously insist that *B* assumed the risk of his process's success while the condition of that success was not within his control is inconsistent.

As a matter of fact, a reading of the opinion in *Smith v. Boyden,*[72] upon which Illustration 3 is based, indicates that the court did believe that the plaintiff (*B*) had control over the condition. "The design was plaintiff's; the plans and specifications were his; the supervision and workmanship were his."[73] Moreover, the conclusion that the plaintiff assumed the risk of non-success was based on the further belief that he had total control over the possibility that the mine would be successful: "The process was new and untried, and was in fact an experiment; if it succeeded the compensation for its installation, together with the royalties provided by the contracts and enhanced value of the patent rights, promised large reward to the plaintiff. . . ."[74]

As in the other cases discussed, the *Smith* court so construed the contract because it felt that justice required that the engineer lose. It concluded with the following:

> The trial court, on amply sufficient evidence, found that the plant was faulty in design, was negligently constructed, and was not constructed in a good and workmanlike manner, was thrown together in a haphazard manner, and that plaintiff, in his attempt to operate the plant, destroyed it and rendered it useless. For these things, plaintiff is responsible.[75]

To claim, as the Restatement does, that this decision resulted from interpreting the parties' intention at the time of contracting is merely absurd.

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[72]49 Idaho 638, 290 P. 377 (1930).

[73]*Id.*, 290 P. at 379.

[74]*Id.*

[75]*Id.* Two other cases are cited as relating to the illustration. One, Zorn v. Sweet, 77 Utah 389, 396 P. 242 (1931), explicitly talked of construction of the contract. The other, Hood v. Gordy Homes, Inc., 267 F.2d 882 (4th Cir. 1959), never mentioned interpretation or construction. The court found the parties' intent by letting in parol evidence which proved beyond a doubt that the plaintiff had assumed the risk. The defendant offered double or nothing and the plaintiff replied: "I am as good a gambler as you are. I will take the deal." The opinion in *Hood* is the only case of the four which supports the position in section 253.

The next illustration, number 4 to section 253, is a brokerage case. It reads:

> A contracts to sell and B to buy land for $100,000. At the same time, A contracts to pay C, a real estate broker, as his commission, $5,000 "on the closing of title." B refuses to consummate the sale. Absent a showing of a contrary intention, a court may conclude that C assumed this risk, and that A's duty is conditional on the sale being consummated. A is then under no duty to pay C.[76]

This example is based upon *Amies v. Wesnofske*.[77] The court's opinion makes clear that it considered assumption of the risk a matter of construction, not of interpretation or intention. Similarly, in *Ellsworth Dobbs, Inc. v. Johnson*,[78] upon which the illustration is also based, the court makes it abundantly clear that assumption of risk is always a matter of construction in these brokerage cases. Furthermore, the court's explicit concern with "justice," "fairness," "reasonableness," and "public policy," throughout the opinion,[79] quashes any justification for citing this case as illustrative of the process of interpretation.

Illustrations 5 through 8 deal with satisfaction of a third party expert. Only one case[80] is cited as relating to any of these illustrations and once again the court was concerned with construction of the contract, not interpretation. The court said: "The issues here principally relate to construction of a specific building contract. . . ."[81] Furthermore, in two of these four illustrations, the effort is to supply a missing term, a classic matter of construction. The illustrations, though, present even more vexing problems. Although the reporter's note indicates a desire to preserve the traditional law on third party satisfaction,[82] the attempted implementation of this goal through section 253 would alone justify a recognition of the changes which have and should have occurred here.[83] An analysis of the illustrations will make this point clear. Illustration 5 states:

> A contracts with B to repair B's building for $20,000, payment to be made "on the satisfaction of C, B's architect, and the issuance of his certificate." A does the repairs, but C refuses to issue his certificate, and explains why he is not satisfied. Other

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[76] DRAFT § 253, Illustration 4 at 60.

[77] 255 N.Y. 156, 174 N.E. 436 (1931).

[78] 50 N.J. 528, 236 A.2d 843 (1967).

[79] *Id.*, 236 A.2d at 852, 853, 855, 856.

[80] Terminal Constr. Corp. v. Bergan County Hackensack River Sanitary Sewer Dist. Authority, 18 N.J.2d 294, 113 A.2d 787 (1955).

[81] *Id.*, 113 A.2d at 795.

[82] DRAFT, Reporter's Note § 253, at 66-67.

[83] *See* Childres, *supra* note 3, at 42-44.

> experts in the field consider A's performance to be satisfactory and C's explanation to be unreasonable. A has no claim against B. The quoted language is sufficiently clear that subsection (1) does not apply. If C is honestly not satisfied, B is under no duty to pay A, and it makes no difference that his dissatisfaction was not reasonable.[84]

There are two arguable ways to apply the condition of satisfaction, these being either an honesty or a reasonableness standard. Since the contract specifies only "satisfaction," doubt exists as to which test of satisfaction was intended by the parties. In light of this uncertainty, section 253(1) must apply,[85] and the illustration's contrary conclusion is wrong. Furthermore, section 253(1) dictates that the reasonableness test be chosen since it will reduce *A's* risk of forfeiture. That the illustration opts to apply the honesty standard is consistent with traditional law,[86] but not with section 253(1). Moreover, to claim that *B* can keep $20,000 worth of repairs and pay nothing is obviously ludicrous.

Illustrations 6 through 8 are all based upon Illustration 5. Some facts concerning the architect's behavior are changed in each case. In Illustration 6, he refuses to issue his certificate although he admits he is satisfied. The illustration contends that section 253(1) does apply and that "the quoted language will be interpreted so that the requirement of the certificate is merely evidentiary and the condition occurs when there is, as here, adequate evidence that C is honestly satisfied."[87] Once again, the conclusion of the illustration cannot be attributed to the rule. How can section 253(1) apply here when the *Draft* concluded it did not apply to Illustration 5? The contracts were identical. Keeping this fact in mind, the reasoning must be that the architect's lying about his satisfaction in this illustration is the differentiating fact and in and of itself creates doubt as to the interpretation of the condition, so that section 253(1) applies. But that cannot be. Interpretation finds the intent of the parties at the time of making the contract. The fraudulent behavior, subsequent to the formation of the contract, of a

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[84]DRAFT § 253, Illustration 5 at 60.

[85]The limitation in section 253, that this section will not apply if the event is within the obligee's control or if there was an assumption of risk, is not relevant here.

[86]Former section 303, *Restatement (First) of Contracts,* explicitly called for honest judgment in this type of case and, if still to be followed, would eliminate this doubt. But the ALI has chosen to omit this section from the *Draft* except by way of using its illustrations, and thus we are left in a quandry. That an illustration opts for one view over another is of little help to us since the *Draft* does not present a rule on this issue. The illustration is supposed to indicate the application of a rule. But inspection of the rule in this case leads to the conclusion opposite that in the illustration.

[87]DRAFT § 253, Illustration 6 at 61.

person not party to the contract, cannot be said to alter the intent of the parties at the time they were making the deal.

Illustrations 7 and 8 suffer from problems similar to those in Illustration 6. In both examples the Restatement contends that 253(1) applies and that a term of reasonableness will be supplied by the court. This appears to follow from an improper inspection by the architect in Illustration 7 and a gross mistake in Illustration 8. Once again, the improper behavior of a third party subsequent to the formation of the contract is supposed to cast doubt upon the intent of the contracting parties at the time they entered into the agreement. The reasoning is indefensible.

Illustration 9 is based upon *American Sugar Refining Co. v. Blake.*[88] The court there continually speaks of construing the contract and never once mentions interpretation. A reading of the facts also indicates that construction was the appropriate process since the defendant was arguing in bad faith, merely using a technical contention. In the case the plaintiff-seller manufactured 15 or more different grades of sugar. On June 7, the defendant-buyer entered into a contract to buy 40 barrels at a stated price, delivery to be made during September. The contract provided that the buyer was to select the grades and quantity he wanted before September 1. During August, the price of sugar dropped and the buyer requested that the contract be cancelled. When the seller refused, the buyer did not send his selection list but instead wrote the following note: "We will not shirk, but will take care of this business as soon as we are in a position to do so."[89] When the case came to court, the buyer argued that the seller had a duty to ship the goods and have them refused before the buyer could be declared in default. Construction to do justice easily eliminated this defense.

It is also important to note that the court did not consider the case, nor should it have, a question of condition versus promise, and thus it presents a spurious citation for section 253. The issue was whether the buyer had an obligatory duty to make the selections, or only a privilege. If the clause is viewed as a condition the buyer may terminate the contract at will, leaving the seller with no possibility for damages.

Charles Ilfeld Co. v. Taylor,[90] upon which Illustration 10 is based, at best goes no further than establishing that the court did not believe a distinction exists between construction and interpretation. Consider the following language:

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[88]102 Conn. 194, 128 A. 523 (1925).

[89]*Id.*, 128 A. at 524.

[90]156 Colo. 204, 397 P.2d 748 (1964).

> In cases of doubt as to the intention of the parties, courts resolve the doubt in favor of an interpretation making the engagement a promise rather than a condition. [citations omitted] And such a rule of construction is founded on a policy of avoiding, if possible, forfeitures.[91]

The court went on to cite section 260 of the *Restatement (First) of Contracts* which was the predecessor of the new section 253 (2). However, the court wound up construing the contract, "as containing promises,"[92] adding a constructive term of reasonable time. This confusion is of no help in understanding anything, though it is at least clear that the court did not subscribe to the *Restatement* rule which prompted its citation.

The court in the famous *Southern Surety Co.* case,[93] upon which Illustration 11 is based, presents what the case law apparently dictates as the rule for cases supposed to be covered by section 253:

> In an effort to ascertain the intent of the parties to a contract, the language used by them should be fairly studied, and terms used ought to be taken in their plain, ordinary, and popular sense. . . . The rule of liberal construction . . . does not come into play unless a fair construction of the contract leaves the intent of the parties in doubt.[94]

Thus where there is doubt, we construe, we do not interpret.

Illustration 12 involves the case of an insured who violated the terms of his policy by getting additional coverage on the same property. The position of the court in the case upon which the illustration is grounded[95] is consistent with the result in the illustration although the decision bears no relationship to the criteria espoused in section 253 (2) or the comment to that section.[96]

Moreover, while section 253 purports to require interpretation by the court in determining whether a term is a promise or a condition, the illustrations require and the cases cited clearly opt for the process of construction. This section, thus, neither restates the law nor presents a sensible rule structure to guide judicial behavior. It will only lead to

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[91] *Id.*, 397 P.2d at 750.

[92] *Id.*, 397 P.2d at 751.

[93] 58 F.2d 541 (10th Cir. 1932), *cert. denied*, 287 U.S. 617 (1932).

[94] 58 F.2d at 546.

[95] Graham v. American Eagle Fire Ins. Co., 182 F.2d 500 (4th Cir. 1950).

[96] The result reached in the illustration and the case have been criticized in detail in Childres, *supra* note 3, at 47-53. The last two illustrations which deal with subsection (3) of section 253 will not be discussed. This section is part of the *Draft's* elimination of conditions subsequent, a position which is unobjectionable. *See* DRAFT § 250, comment *e* at 38.

further confusion in the profession's effort to deal with so-called conditions.

SECTION 254

SATISFACTION OF THE OBLIGOR AS A CONDITION. When it is a condition of an obligor's duty that he be satisfied with respect to the obligee's performance or with respect to something else, an interpretation is preferred under which the condition occurs if a reasonable man in the position of the obligor would be satisfied if it is practicable to apply such a test.[97]

Section 254, which deals with satisfaction of the obligor, is similar to section 253 in that it creates an interpretive preference. In this case, the preferred interpretation is for reasonable satisfaction rather than honest satisfaction. At this point an examination of the *Draft's* distinction between these two notions is timely. It will be readily observed that the *Draft* has made the distinction between honest satisfaction and reasonable satisfaction impossible and irrelevant in virtually all transactional situations.

Section 254, comment *a,* states:

> The language of the agreement will often not make it clear whether the condition is one of reasonable or merely honest satisfaction. Under any interpretation, the exercise of judgment must be in accordance with the duty of good faith and fair dealing, (§ 231).[98]

Turning to section 231[99] we find that the definition of good faith, taken from the Uniform Commercial Code, is "honesty in fact in the conduct or transaction concerned."[100] Section 231 goes on to note that "[g]ood faith . . . excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness."[101] The tautology is visible. The definition requires that honest judgments be made in good faith and good faith requires a showing that one's behavior is reasonable. Honesty thus requires reasonableness.

The courts often resolve the honesty/reasonableness quandry by satisfying the criteria for both tests. For example, *Ard Dr. Pepper Bottling Co. v. Dr. Pepper Co.,*[102] on which Illustration 1 to section 254 is

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[97] DRAFT § 254, at 69.

[98] *Id.* § 254, comment *a* at 69.

[99] RESTATEMENT (SECOND) OF CONTRACTS § 231 (Tent. Draft No. 5, 1970).

[100] UNIFORM COMMERCIAL CODE § 1-201 (19).

[101] Note 99 *supra.*

[102] 202 F.2d 372 (5th Cir. 1953).

based, involved a license which allowed the licensor to terminate at any time if in his sole, exclusive, and final judgment made in good faith, the licensee did not perform the duties listed in the contract. Although considering the condition to be one of honest satisfaction, the court developed in detail the "substantial evidence of . . . breaches of the license argreement,"[103] and thus the reasonableness of the licensor seeking to terminate.

The decision to uphold the licensor's action was not based upon interpretation, as section 254 would have us believe. The court said: "In the final analysis, the decision of the case depends upon construction of those terms of the contract giving Dr. Pepper the right or option to terminate or cancel the license."[104] It is not surprising that section 254 presents the same confusion between interpretation and construction as shown in sections 252 and 253.

In Illustration 2, "A contracts to sell and B to buy 500 barrels of cherries in syrup, quality to be satisfactory in buyer's honest judgment, delivery to be in installments."[105] The illustration concludes that the test is honest satisfaction since there seems to be no doubt about the agreement's language. This illustration is based on *Devoine Co. v. International Co.*[106] In that case, the facts were similar to the illustration except the term of personal satisfaction simply stated "quality satisfactory." As originally framed, it does not support the illustration's opting for the honesty standard since section 254 would have required that the reasonableness test be preferred. In the case, the court used the honesty test but admitted diverse evidence to prove that the buyer's decision was unreasonable and that the true reason for the attempted termination was a decline in market price. The court clearly felt that the buyer was acting in bad faith and thus construed the contract to do justice. It said: "The first [question] is that of the construction of the contract clause, 'quality satisfactory.' "[107] If this case is support for anything it is not for the *Draft*. Rather, it indicates that courts look for reasonableness in almost all of these cases and construe the contract to do justice while only paying lip service to the theoretical distinction, if any, between honesty and reasonableness.

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[103]*Id.* at 376.

[104]*Id.* at 377.

[105]The illustration holds that what is required is honesty in accordance with a section 231 duty of good faith and fair dealing. The admixture of honesty and reasonableness has been noted and applies to all the illustrations.

[106]151 Md. 600, 136 A. 37 (1927).

[107]*Id.*, 136 A. at 38.

The court in *McCartney v. Badevinac*,[108] cited under Illustration 2 for the proposition "that the obligor's mere statement of dissatisfaction is not conclusive,"[109] once again supports criticism of the *Draft*. The case involved a detective who was hired to identify the thief of a particular diamond. The contract specified that the detective agreed to give good and satisfactory service. The detective found the thief, but the employer refused to pay, saying he was not satisfied. In the words of the trial court, approved by the appellate court, "we have met few contentions with so little merit. . . ." The court paid lip service to the honesty rule and pointed to the evidence of the reasonableness of the detective's proof: "The words 'satisfactory proof' entitled the [plaintiff] to demand that the fact . . . should be shown with reasonable definiteness and certainty."[110]

Illustration 3 must be criticized in that its claim of interpretation to reach the decision finds no support in the cited cases. In the words of Justice Holmes in *Hawkins v. Graham*:[111] "In doubtful cases courts have been inclined to construe agreements of this class as agreements to do the thing in such a way as reasonably ought to satisfy."[112] Similarly, in *Haymore v. Levinson*,[113] the court refused to apply the honesty standard because it "might produce unconscionable results,"[114] and instead employed the reasonableness test because the "ends of justice are obviously better served. . . ."[115] This methodology cannot be said to involve a search for the original intent of the parties[116] through interpretation.

Illustration 4 involves a contract in which *A* agrees to paint a picture of *B's* daughter with payment by *B* only if he is entirely satisfied. This is the only *Draft* example in which honest satisfaction does operationally differ from reasonable satisfaction, and here it exists because the appreciation of art is highly personal. As the court in *Gibson v.*

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[108]62 Colo. 76, 160 P. 190 (1916).

[109]DRAFT, Reporter's Note § 254, comment *a*.

[110]62 Colo. 76, 160 P. at 191, 192, *citing*, Buffalo Loan Co. v. Knights Templar, 126 N.Y. 450, 27 N.E. 942 (1891). A fair reading of section 254 would hold that the reasonableness test be applied in *McCartney*, a fact not acknowledged by the *Draft*.

[111]149 Mass. 284, 21 N.E. 312 (1889).

[112]*Id.*, 21 N.E. at 313.

[113]8 Utah 2d 66, 328 P.2d 307 (1958).

[114]*Id.*, 328 P.2d at 309.

[115]*Id.*

[116]That the court does mention interpretation once in the opinion demonstrates its confusion in the meaning of the terminology. In the last case cited to this illustration, Bruner v. Hegyi, 42 Cal. App. 97, 183 P. 369 (1919), the court avoids mentioning either term.

[117]39 Mich. 49 (1878).

Crange[117] noted, we are often "unable to point out with clearness or certainty the defects or objections."[118]

Illustration 5 is meant to show the case in which a preference for the reasonableness test cannot be taken as a matter of practical applicability. A reading of the court's opinion in the case on which the illustration is based, *Ferris v. Polansky*,[119] however, shows that the court considered the problem one of construction and that it opted for the honesty test, which it believed to be the rule in the majority of the courts in master-servant cases.[120] The rule proposed by the *Draft* may not be found in the case.

That section 254 opts for a preference of the reasonableness test over the honesty test is laudable and is also consistent with current law.[121] Yet, the proposed rule suffers from such major deficiencies that it cannot be accorded credibility. It (a) renders the honesty and reasonableness tests operationally indistinguishable, and (b) confuses the processes of interpretation and construction, thereby undermining the intended effect of condition law.

Section 255

EXCUSE OF A CONDITION TO AVOID FORFEITURE. To the extent that the non-occurrence of a condition would cause extreme forfeiture, a court may excuse the condition unless its occurrence was a material part of the agreed exchange.[122]

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[118]*Id.* at 50. The reporter's note also refers to Mattei v. Hopper, 51 Cal. 2d 119, 330 P.2d 625 (1958), a decision which must be condemned. The plaintiff contracted to buy real property from the defendant. The buyer wished to be assured of tenants for his supermarket before going ahead with the investment, so that his obtaining satisfactory leases was a condition of the contract. For a reason not disclosed by the court the seller refused to perform. His defense, a contention technical only made in bad faith, was that the satisfaction clause made the contract illusory because of want of consideration. That the court labored under this contention and felt compelled first to decide whether the honesty or reasonableness test should be applied must be criticized as unnecessary. Furthermore, its opinion that the satisfaction clause is one of "fancy, taste, or judgment," 51 Cal. 2d 119, 330 P.2d at 627, thus requiring honest satisfaction makes no sense. All satisfaction clauses require some type of judgment so that that term is meaningless in distinguishing honesty from reasonableness. To say then that the clause resembles fancy or taste as in an art work more than it resembles "commercial value of quality, operative fitness, or mechanical utility," which require the reasonableness test according to the court, is wrong.

[119]191 Md. 79, 59 A.2d 749 (1948).

[120]The court cites Annot., 6 A.L.R. 1497, 1502 (1920) for this point. The writer there argues unconvincingly that the honesty test should apply in all master-servant cases, because "of the various possible grounds for dissatisfaction." *Id.*

[121]Childres, *supra* note 3, at 42.

[122]Draft § 255, at 74.

Section 255 teaches that where a condition fails to occur the other party has the option to cancel, unless the condition is excused by "a court" to avoid "extreme forfeiture." This section suffers from two deficiencies. The first is a form of logical inconsistency. It is necessary to the existence of the law of conditions to maintain that the option to cancel shall exist regardless of the materiality of the failure of the condition. Yet according to this section's comment, "trifling departure[s]"[123] may be excused. We are required, therefore, to distinguish immaterial breaches which will not excuse the non-occurrence of the condition from trifling breaches which will excuse it. The difficulty in discussing this distinction is that we are without adequate linguistic tools for the job. Even if we could distinguish the trifling from the immaterial, the *Draft's* distinction is wrong: the trifling must surely be more material than the immaterial.

The second deficiency is a lack of external validity. For example, Illustration 1 continues a misleading suggestion from the famed opinion in *Jacobs & Youngs v. Kent,*[124] in which justice Cardozo decided that an agreement to use one brand of pipe was a promise, so that the use of a different brand of equal quality entitled the other party only to damages caused, and not to cancellation. He could have written of excusing conditions because of forfeiture[125] or any number of other things; but he didn't, and it would be just as well to refer the case to section 253 where it belongs.

Optimally, of course, we would admit that there is no law of conditions and deal with the case elsewhere. The *Draft* itself does this to a certain extent. Exactly the same problem appears in Illustration 6 to section 231 of the *Restatement (First) of Contracts,* which provides the duty of good faith and fair dealing. That illustration is not entirely acceptable but the premise that the controversy is to be resolved without reference to any law of conditions deserves enthusiastic support.

Illustration 2 to section 255 and the case upon which it is based, *Delaware Steel Co. v. Calmar Steamship Co.,*[126] involves an immaterial or trifling default which could not have been litigated but for the language of conditions. The Third Circuit disposed of the case on the basis of immateriality. It did not mention conditions,[127] much less the propo-

[123]*Id.* § 255, comment *c* at 77. It is unclear whether the *Draft's* trifling departure point is meant to be restricted to controversies involving extreme forfeitures.

[124]230 N.Y. 239, 129 N.E. 889 (1921).

[125]"Extreme forfeiture?" Some $3,000 remained to be paid on a $75,000 contract price.

[126]378 F.2d 386 (3d Cir. 1967).

[127]The court's main point was that to enforce the requirement "would be pointless formalism." *Id.* at 388.

sition it is alleged to illustrate, that is, the excuse of conditions to avoid extreme forfeiture.[128]

Illustration 3 continues a supposed controversy which one hopes even the law of conditions was never able to provoke to litigation. An agreement to repair a residence for $10,000 included, "on condition that the repairs are completed by October 1."[129] The repairs were completed on October 2, and the illustration reads as though the owner declined altogether to pay. This non-problem, or piece of non-litigation, is to be resolved, we are told, with the following circumlocution: "A court may decide that there are two cumulative conditions, repair of the house and completion of the repairs by October 1, and that the second condition is excused to the extent of one day."[130] If such extreme sophistry is indeed needed, surely someone should explain why.[131]

Illustrations 4 and 5, which raise a vexed option contract problem, agree with former justice Traynor that perfect tender or strict performance is not required to keep an option open.[132] Although we agree with his decision, it is not good traditional law, and the *Draft* commits a tactical error in using it to defend and maintain that law. In *Holiday Inns,* the defendants contracted on September 30, 1963, to give an option to plaintiffs to purchase real property for $198,633. In order to exercise the option, the plaintiffs had to give written notice no later than April 1, 1968. The contract also provided for an initial payment of $10,000 and four additional payments of $10,000 to be made to defendants on July 1 of each year beginning in 1964, unless the option was exercised or cancelled before the next such payment became due. These payments were not to be applied to the purchase price. The contract provided that "it is mutually understood that failure to make payment on or before the prescribed date will automatically cancel this option without further notice."[133] After receiving the down payment and two annual payments, the defendant terminated the contract, claiming that plaintiffs' 1966 installment mailed on June 30 did not reach him until July 2, one day late. Plaintiffs brought suit but the trial court gave summary judgment to the defendants.

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[128]What forfeiture or "extreme forfeiture" might mean in the context of the case is more than a little hard to say. A carriage contract with goods damaged in transit, the question was which party, or more realistically which insurance company, was to be liable for the damage.

[129]DRAFT § 255, Illustration 3 at 77.

[130]*Id.*

[131]It should perhaps be noted that *Restatement (First) of Contracts* at least spares us this sophistry. *See* RESTATEMENT (FIRST) OF CONTRACTS § 302, Illustration 1 (1932).

[132]70 Cal. 2d 327, 450 P.2d 42, 74 Cal. Rptr. 722 (1969).

[133]*Id.,* 450 P.2d at 43, 74 Cal. Rptr. at 723.

Justice Traynor's opinion clearly shows that the immateriality of the breach and a concern for justice formed the basis of the reversal of the lower court's action. The court noted that the plaintiffs had already paid $30,000, had expended large sums on developing land adjacent to the option property, with these expenditures substantially increasing the value of that property, and that the plaintiffs had always acted in good faith. The court concluded: "Defendant has not suffered any injury justifying termination of the contract, and none of his reasonable expectations have been defeated."[134] However, the court had to get around the traditional law as to option contracts and its effort is no model of clarity:

> Although the contract in the instant case is an option contract, the question is not whether the exercise of the option was timely, but whether the right to exercise the option in the future was forfeited by a failure to pay the consideration for that right precisely on time. Defendants reliance on *Cummings v. Bullock* (9th Cir. 1966) 367 F.2d 182, and *Wilson v. Ward* (1957) 155 Cal. App. 2d 390, 317 P.2d 1018, is therefore misplaced. Both those cases dealt with the time within which an option must be exercised and correctly held that such time cannot be extended beyond that provided in the contract. To hold otherwise, would give the optionee, not the option he bargained for, but a longer and therefore more extensive option. In the present case, however, the plaintiffs are not seeking to extend the period during which the option can be exercised but only to secure relief from the provision making time of the essence in tendering the annual payments.[135]

If justice Traynor's distinction is that breach of the time provision can be excused if it is an intermediate payment but not if it is the final payment which exercises the option, then his point is hard to understand. Furthermore, a fair reading of the opinion by the court in *Cummings v. Bullock*,[136] which Traynor discusses, contradicts his attempted distinction. That case involved a lease with an option to buy. The contract specified that if the lessee wanted to exercise the option he had to pay $4,000 annually on the same date until the total $40,000 purchase price was paid. The lessee wrote the seller on July 27, 1960, of his intent to purchase and on November 28, sent his first intermediate payment to the agreed bank and a letter to the seller advising him of the payment. The letter did not reach the seller until December 2 since the seller had moved without notifying the buyer. Although the bank received the

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[134] *Id.*, 450 P.2d at 45, 74 Cal. Rptr. at 725.

[135] *Id.*, 450 P.2d at 44-45, 74 Cal. Rptr. at 724.

[136] 367 F.2d 182 (9th Cir. 1966).

check on November 30, the court held that there was no compliance with the option. It said that time is of the essence in option contracts and seemed to plead helplessness: "The result may seem harsh and the rules applied are technical."[137] The decision in *Cummings* squares with traditional option law. This justice Traynor and the California court refused to accept; as far as was necessary for their case, they imported considerations of justice, good faith, substantial reliance, and damage or prejudice to the seller into option law.

Holiday Inns is no lonely outpost either. Chief justice Fuld's opinion in *Sy Jack v. Pergament Syasset*[138] goes even further by acknowledging that the true basis for this view is not to be found in traditional option law. In the case, the lessee operated his business in the same rented location for 15 years. His newest lease granted an option to renew for 5 additional years which required written notice of its exercise by March 31, 1969. The lessee mailed this notice on March 28 but it was lost in the mail. The court noted that the lessee had built up over the years substantial and valuable good will, that he had tried in good faith to give notice and that the landlord did not suffer any damage or prejudice. These considerations and an overriding concern for justice permeate the majority opinion. "Not alone authority but a sense of justice and fairness support the decision that the defendant should be deemed to have exercised his option to renew."[139]

For the *Draft* to rely on *Holiday Inns* is tactically nonsensical since that case, like *Sy Jack,* undermines the use of conditions in the area of option contracts involving land, where it has been most often applied without modification. These cases do not support the rule in section 255 because traditional option law has always held that time provisions are a material part of the agreed exchange. That these distinguished jurists looked to reasonable standards and materiality, in spite of contrary historical views, presents the strongest argument to employ those same standards in all transactional classes.

It is this view which makes most sense in light of current business practice, judicial decisions, and sound public policy.[140]

Conclusion

The existence of the law of conditions in contracts may seriously be questioned because it allows repudiation of contractual obligations in

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[137] *Id.* at 186.

[138] 27 N.Y.2d 449, 267 N.E.2d 462, 318 N.Y.S.2d 720 (1971).

[139] *Id.*, 267 N.E.2d at 464, 318 N.Y.S.2d at 722.

[140] *See* Childres, *supra* note 3.

cases where the failure of the condition was not material to the interests of the contracting parties. It foments litigation that can only be characterized as being contested in bad faith. Typically, one party tries to avoid his obligations by arguing the non-occurrence of a condition, knowing that it in no way prejudiced his rights and duties under the contract.

To avoid unnecessary litigation is in itself a desirable goal and thus presents one important argument against condition law. But this law has created a second important justification for its elimination, namely, covert decisions by courts to avoid potentially harsh results. As Llewellyn has noted:

> The net effect is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy. Covert tools are never reliable tools."[141]

Even with these arguments at hand,[142] the ALI chose to retain this body of law in somewhat revised form. The extent of the potential harm this threatens to contracts spawned this critical analysis of the tentative draft.

Alarming deficiencies are manifestly present in all aspects of the tentative draft, quite apart from the wrongheadedness of the entire enterprise. Some rules have been found to be logically inconsistent in that they cannot guide a court to the decisions that they purport to endorse. Other rules create regressive law while purporting to restate contemporary contracts. Illustrations are unsatisfactory because the *Draft* often takes positions of questionable desirability which precisely contradict the case decisions. Finally, the cases cited by the *Draft* repeatedly present law contradictory to that offered by the ALI. This lack of external validity cannot be taken lightly when it is considered that the purpose of the ALI's series is to restate the law.

Even accepting, then, the position that some of the language and effect of conditions law should be retained, the attempt at the implementation of that position by the ALI has been entirely unsuccessful. The chief reason for the condition of the *Draft* in this area is probably not that the persons primarily responsible for the *Draft* have done their job poorly. It is more likely that the job was impossible from the start. Conditions are dead. To try to keep the mummy around and pretend it has some life is a thankless, as well as an impossible task.

The ALI should withdraw *Restatement (Second) of Contracts (Tent. Draft No. 7, 1972).*

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[141]Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939).

[142]Since the reporter's note at the end of section 255 cites Childres, *supra* note 3, the ALI is presumably aware of these arguments.

MOTIVE OR PURPOSE AND ACTS OF CONGRESS

*Hector Currie**

May a bad motive or purpose[1] vitiate an otherwise valid act of Congress? The Supreme Court has regularly answered this question in the negative. The argument made in *McCray v. United States*[2] that "[when] a particular department of the government . . . exert[s] its lawful powers with the object or motive of reaching an end not justified, . . . it becomes the duty of the judiciary to restrain the exercise"[3] drew the response: "[T]his reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department."[4] The Court added: "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."[5]

There have been cases striking down acts of Congress, obviously within a granted power, which the Court thought were designed to produce an unauthorized effect. Perhaps the most notable of these was *Hammer v. Dagenhart*,[6] which held that an act prohibiting the transportation in interstate commerce of products of child labor "in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States."[7] This approach, however, has long since been abondoned. *Dagenhart* was overruled in *United States v. Darby*,[8] where the Court said: "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts

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[1]The Supreme Court has used the words, motive and purpose, without distinction in meaning. *But see* Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 HARV. L. REV. 1887 (1970).

[2]195 U.S. 27 (1904).

[3]*Id.* at 54.

[4]*Id.*

[5]*Id.* at 56.

[6]247 U.S. 251 (1918).

[7]*Id.* at 271-72.

[8]312 U.S. 100 (1941).

are given no control."[9] And in *Sonzinsky v. United States,*[10] a tax case, the Court stated: "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of the courts."[11]

In *United States v. O'Brien*[12] the defendant, who had publicly burned his Selective Service registration certificate to express his antiwar beliefs, was convicted of violating the Universal Military Training and Service Act of 1948,[13] which applied to any person "who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate. . . ." The italicized words had been added by amendment in 1965. The defendant argued that the 1965 amendment was unconstitutional because of what he called the purpose of Congress to suppress freedom of speech. Chief Justice Warren commented: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[14] After quoting from *McCray v. United States*[15] and referring to *Arizona v. California,*[16] he went on: "Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature. . . ."[17] At this point a footnote was appended:

> The Court may make the same assumption in a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose. The principal class of cases is readily apparent—those in which statutes have been challenged as bills of attainder. . . . The inquiry into whether the challenged statute contains the necessary element of punishment has on occasion led the Court to examine the legislative motive in enacting the statute. See, *e.g., United States v. Lovett,* 328 U.S. 303 (1946). Two other decisions not involving a bill of attainder analysis contain an inquiry into legislative purpose or motive of the type that *O'Brien* suggests we engage in in this case. *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 169-84 (1963); *Trop v. Dulles,* 356 U.S. 86, 95-97 (1958). The inquiry into legislative purpose or motive in *Ken-*

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[9] *Id.* at 115.
[10] 300 U.S. 506 (1937).
[11] *Id.* at 513-14.
[12] 391 U.S. 367 (1968).
[13] 50 U.S.C. APP. § 462(b) (3) (1970).
[14] 391 U.S. at 383.
[15] 195 U.S. 27 (1904).
[16] 283 U.S. 423 (1931).
[17] 391 U.S. at 383.

> *nedy* and *Trop,* however, was for the same limited purpose as in the bill of attainder decisions—*i.e.,* to determine whether the statutes under review were punitive in nature. We face no such inquiry in this case.[18]

It seems highly unlikely that the Court will ever again strike down an act of Congress, which was enacted within a granted power, on the basis of a supposed motive or purpose to encroach on the authority of the states. It is not unlikely, however, that the Court may strike down acts of Congress, as it has done in the recent past, because of a supposed motive or purpose to inflict punishment without according rights guaranteed by the fifth and sixth amendments,[19] or in violation of the eighth amendment,[20] or the bill of attainder clause.[21] The element common to such cases is the finding of a purpose to punish. It is instructive to analyze the relatively few cases, beginning with *Ex parte Garland*[22] and concluding with *United States v. Brown,*[23] where the Supreme Court in considering the validity of acts of Congress[24] has dealt with issues of this kind.

Ex parte Garland (1867)

This case must be discussed in conjunction with *Cummings v. Missouri,*[25] as the opinions of the Court in the two cases were interrelated and the dissenting opinion applied to both. *Garland* held invalid an act of Congress enacted in 1865[26] which provided that no person should thereafter be admitted to practice in the Supreme Court or, after a specified date, in any federal court, unless he took an oath that he had not borne arms against, or given aid to persons in arms against, the United States, nor exercised any office of, or yielded voluntary support to, any pretended government or authority within the United States that was hostile to the United States. Garland had been a member of the Confed-

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[18] *Id.*

[19] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

[20] Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion).

[21] United States v. Brown, 381 U.S. 437 (1965).

[22] 71 U.S. (4 Wall.) 333 (1867).

[23] 381 U.S. 437 (1965).

[24] A "proper respect for the acts of a coordinate branch of the Government" has often been professed by the Court when dealing with acts of Congress. Less respect has perhaps been accorded to state legislation. Even here, however, the Court has expressed reluctance to inquire into motive or purpose; for a recent example, *see* Palmer v. Thompson, 403 U.S. 217 (1971). *But see* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive,* 1971 SUP. CT. REV. 95.

[25] 71 U.S. (4 Wall.) 277 (1867).

[26] Act of Jan. 24, 1865, ch. 20, 13 Stat. 424.

erate Congress. *Cummings* invalidated a similar but more sweeping test oath prescribed by the Missouri Constitution of 1865 for priests and clergymen, attorneys, and others designated. Cummings, a Roman Catholic priest, had taught and preached without first taking the oath.

Justice Field wrote the opinion of the Court in both cases. His opinion in *Garland* included this language concerning the power of Congress to enact such legislation:

> In the case of Cummings against The State of Missouri, just decided, we have had occasion to consider at length the meaning of a bill of attainder and of an *ex post facto* law in the clause of the Constitution forbidding their passage by the States, and it is unnecessary to repeat here what we there said. A like prohibition is contained in the Constitution against enactments of this kind by Congress; and the argument presented in that case against certain clauses of the constitution of Missouri is equally applicable to the act of Congress under consideration in this case.[27]

Again in *Garland* the Court said:

> The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution. That this result cannot be effected indirectly by a State under the form of creating qualifications we have held in the case of *Cummings v. The State of Missouri,* and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress.[28]

The reasoning in *Cummings* was that, owing to the lack of a rational relationship between many of the acts required to be disavowed and fitness to follow the listed pursuits or professions, the disabilities that the constitution of Missouri imposed could not be considered a mere regulation of professional or official qualifications and had to be considered punishment. As the Court said:

> It is evident from the nature of the pursuits and profession of the parties, placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions. There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrollment or draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church; nor can a fact of this kind or the expression of words of sympathy with some of the

[27] 71 U.S. (4 Wall.) 333, 377-78 (1867).

[28] *Id.* at 379-80.

> persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney or counsellor to practice his profession, or of the professor to teach the ordinary branches of education, or of the want of business knowledge or business capacity in the manager of a corporation, or in any director or trustee. It is manifest upon the simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the professions and pursuits. The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment. . . . The disabilities created by the constitution of Missouri must be regarded as penalties — they constitute punishment.[29]

The dissenting opinion of Justice Miller, joined by three other members of the Court, argued with reference to *Garland* that "fidelity to the government under which he lives, a true and loyal attachment to it, and a sincere desire for its preservation, are among the most essential qualifications which should be required in a lawyer",[30] and with reference to *Garland* and *Cummings* that there was no bill of attainder or *ex post facto* law.[31]

These test oath cases explicitly held that disabilities imposed by a statute that could not rationally be considered a regulatory act would be regarded as punishment.[32] What is implicit in the cases is that disabilities will not be characterized as punishment if they are created by a statute that can rationally be considered a regulatory act.

United States v. Lovett (1946)[33]

Section 304 of the Urgent Deficiency Appropriation Act of 1943[34] provided that after November 15, 1943, no salary or compensation should be paid to three named employees of executive agencies of the Government, except for services as jurors or members of the armed forces, unless

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[29]71 U.S. (4 Wall.) 277, 319-20 (1867).

[30]71 U.S. (4 Wall.) 333, 385 (1867).

[31]*Id.* at 386-96.

[32]*See* Note, *Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the Lovett, Trop, Perez, and Speiser Cases,* 34 IND. L.J. 231, 250-51 (1959).

[33]328 U.S. 303 (1946).

[34]Act of July 12, 1943, ch. 218, 57 Stat. 431, 450.

prior to November 15, 1943, they should be appointed again by the President with the advice and consent of the Senate. Despite the enactment, and the President's failure to reappoint them, the three continued to perform their duties after November 15 but no compensation was paid to them after that date. The employees brought actions for their pay in the Court of Claims, and had judgment rendered in their favor. The Supreme Court affirmed on the ground that section 304 was a bill of attainder.

The Court held, in an opinion by Justice Black, that the purpose of section 304 was not merely to cut off the compensation of the employees but was rather to bar them permanently from government service, and that the proscription was punishment which made section 304 a bill of attainder. In support of his conclusion about the purpose of section 304, Justice Black quoted from a report of the House Appropriations Committee and from the debates in the House. However, as the Court observed in *United States v. O'Brien:* "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."[35] In the *Lovett* case the general difficulty was increased by the fact that the Senate repeatedly rejected the substance of section 304 and finally adopted the fifth conference report, and when the President signed the bill he said: "The Senate yielded, as I have been forced to yield, to avoid delaying our conduct of the war. But I cannot yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional."[36] It was not convincing in these circumstances to deduce the purpose of section 304 from legislative history in only one house.[37] There was in fact no need to make use of the legislative history. The Court relied heavily on *Cummings* and *Garland.* Adopting the reasoning of those cases, the Court might have said that, as section 304 could not possibly be considered a valid regulation, the disability it imposed was necessarily punishment.

If, as the Court held from the section's language as well as the circumstances of its passage, section 304 "was designed to force the employing agencies to discharge respondents and to bar their being hired by any other governmental agency,"[38] it was apparently an unconstitutional encroachment on executive power.[39] If, as was urged by Justice Frankfurter, concurring, and by one member of the Court of Claims, section

[35] 391 U.S. 367, 384 (1968).

[36] 328 U.S. at 312-13.

[37] *Id.* at 324-25 (concurring opinion).

[38] *Id.* at 313-14.

[39] *Cf.* Myers v. United States, 272 U.S. 52 (1926).

304 had been construed merely to prevent the ordinary disbursement of money to pay the salaries of the three named employees, it would still apparently have been arbitrary action in violation of the due process clause of the fifth amendment.[40] These were issues the Court mentioned but declined to consider. In any event the section "was on its face aimed at particular individuals,"[41] and a punitive intent could properly have been inferred from that fact alone.

Justice Frankfurter concurred, in an opinion joined by Justice Reed. A bill of attainder, he said, must specify an offense and make a finding of guilt, and section 304 did neither. Nor did it purport to discharge the three employees, who had continued to perform their duties and who thus were entitled to judgment for their pay.

Trop v. Dulles (1958)[42]

Trop applied for a passport. His application was denied on the ground that he had lost his citizenship under Section 401 (g) of the Nationality Act of 1940, as amended, which provided in part: "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: . . . . (g) Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces. . . ."[43] Trop sought a declaratory judgment that he was a citizen. The Government's motion for summary judgment was granted, and the Court of Appeals affirmed, one judge dissenting. The Supreme Court reversed.[44]

There was no opinion of the Court. Chief Justice Warren, in an opinion joined by Justices Black, Douglas, and Whittaker, concluded that citizenship is not subject to the general powers of the national government[45] but that even if citizenship could be divested in the exercise of some governmental power, section 401 (g) prescribed a cruel and unusual punishment in violation of the eighth amendment and thus was invalid. Chief Justice Warren explained:

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[40]328 U.S. 303, 328 (1946) (concurring opinion).

[41]Flemming v. Nestor, 363 U.S. 603, 619 (1960).

[42]356 U.S. 86 (1958).

[43]8 U.S.C. § 1481 (a) (8) (1970).

[44]356 U.S. 86 (1958).

[45]A contention rejected in Perez v. Brownell, 356 U.S. 44 (1958), which, on a dubious interpretation of the first sentence of the 14th amendment, was overruled in Afroyim v. Rusk, 387 U.S. 253 (1967). On the general topic, *see* Comment, *Does Congress Have the Constitutional Authority to Expatriate American Citizens?*, 22 BUFFALO L. REV. 219 (1972).

> In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.[46]

The quoted language fairly presents the problem. A statute should be upheld "if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose." That is to say, if a statute is rationally related to achievement of a legitimate governmental purpose, it cannot properly be characterized as intended to punish. If it is not so related, it can be explained only in terms of its punitive effect.

Chief Justice Warren continued:

> The purpose of taking away citizenship from a convicted deserter is simply to punish him. There is no legitimate purpose that the statute could serve. . . . It is urged that this statute is not a penal law but a regulatory provision authorized by the war power. It cannot be denied that Congress has power to prescribe rules governing the proper performance of military obligations, of which perhaps the most significant is the performance of one's duty when hazardous or important service is required. But a statute that prescribes the consequence that will befall one who fails to abide by these regulatory provisions is a penal law.[47]

The fallacy is evident. If section 401 (g) could be regarded as a measure rationally related to the performance of military obligations, it should not have been called a penal law notwithstanding the fact that it might "have both a penal and a nonpenal effect."

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[46]356 U.S. at 96-97 (footnotes omitted).

[47]*Id.* at 97.

In a dissenting opinion joined by Justices Burton, Clark, and Harlan, Justice Frankfurter asked: "Can it be said that there is no rational nexus between refusal to perform this ultimate duty of American citizenship and legislative withdrawal of that citizenship?" His answer that such a nexus exists was persuasive.

> Congress may well have thought that making loss of citizenship a consequence of wartime desertion would affect the ability of the military authorities to control the forces with which they were expected to fight and win a major world conflict. It is not for us to deny that Congress might reasonably have believed the morale and fighting efficiency of our troops would be impaired if our soldiers knew that their fellows who had abandoned them in their time of greatest need were to remain in the communion of our citizens.[48]

If the statute was an exercise of the war power, it was not a penal law.

> Since there are legislative ends within the scope of Congress' war power that are wholly consistent with a "nonpenal" purpose to regulate the military forces, and since there is nothing on the face of this legislation or in its history to indicate that Congress had a contrary purpose, there is no warrant for this Court's labeling the disability imposed by § 401 (g) as a "punishment."[49]

Justice Brennan's was the deciding vote in *Trop*. His concurring opinion made no reference to the eighth amendment but concluded that the statute was outside the power of Congress. "It is difficult, indeed, to see how expatriation of the deserter helps wage war except as it performs that function when imposed as punishment. It is obvious that expatriation cannot in any wise avoid the harm apprehended by Congress. After the act of desertion, only punishment can follow, for the harm has been done."[50] But general awareness in the armed services that loss of nationality would be the consequence where desertion was followed by court-martial conviction and dishonorable discharge, might have been a real support to discipline and morale. Justice Brennan virtually conceded the statute's rational basis and rested his decision on what were really policy grounds. "Admittedly Congress' belief that expatriation of the deserter might further the war effort may find some—though necessarily slender—support in reason. But here, any substantial achievement, by this device, of Congress' legitimate purposes under the war power seems fairly remote. It is at the same time abundantly

[48] *Id.* at 121-22 (dissenting opinion).

[49] *Id.* at 125 (dissenting opinion).

[50] *Id.* at 109-10 (concurring opinion).

clear that these ends could more fully be achieved by alternative methods not open to these objections."[51] If, however, the end is legitimate, the choice of appropriate means belongs to Congress.[52]

Fleming v. Nestor (1960)[53]

Nestor, an alien, entered the United States in 1913, and became eligible for old-age benefits in 1955. In 1956 he was deported under Section 241 (a) of the Immigration and Nationality Act[54] for having been a member of the Communist Party from 1933 to 1939. Section 202 (n) of the Social Security Act[55] provided for termination of old-age, survivor, and disability insurance benefits payable to an alien who was deported after the effective date of the section on any of 14 specified grounds, including the ground for which Nestor was deported. Four other grounds of deportation under the Immigration and Nationality Act would not cause termination of benefits.

Nestor brought action against the Secretary of Health, Education, and Welfare to enforce payment of his benefits. The District Court held Section 202 (n) of the Social Security Act unconstitutional under the due process clause of the fifth amendment in that it deprived Nestor of an accrued property right. The Secretary appealed, and the Supreme Court reversed.[56]

Justice Harlan wrote the opinion of the Court. Nestor had no accrued property right, but his interest under the act was protected by the due process clause against arbitrary governmental action. The statute would be upheld as not violative of due process unless it manifested a patently arbitrary classification, utterly lacking in rational justification, and such was not the case. One advantage that might be thought to inhere in the social security system was the increase in national purchasing power resulting from old-age benefits,[57] but no such advantage would accrue from payment of benefits to persons living out of the country. It was irrelevant whether the statute in fact was based on this reasoning, and irrelevant that the section did not extend to all to whom the reasoning might apply. Nor could it be considered irrational for

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[51] *Id.* at 114 (concurring opinion).
[52] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
[53] 363 U.S. 603 (1960).
[54] 8 U.S.C. § 1251 (a) (1970).
[55] 42 U.S.C. § 402 (n) (1970).
[56] 363 U.S. 603 (1960).
[57] *See* Helvering v. Davis, 301 U.S. 619, 640-45 (1937).

Congress to conclude that the public purse should not be used to support those deported on the grounds specified in the statute.

The arguments most strongly urged for Nestor in the Supreme Court were that termination of his benefits was punishment without a judicial trial; was punishment by legislative act, making section 202 (n) a bill of attainder; and was punishment for past conduct not unlawful when engaged in, making the section an *ex post facto* law. The Court refused to characterize the termination of benefits as punishment. The history and scope of section 202 (n) were said to demonstrate that a punitive purpose lay behind the statute, but the Court did not agree:

> We observe initially that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground. Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it. "[I]t is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void." *Fletcher v. Peck,* 6 Cranch 87, 128.[58]

After reviewing the meager legislative history of section 202 (n), Justice Harlan concluded that it was impossible to find the unmistakable evidence of punitive intent that was required. The specified grounds of deportation would embrace the great majority of persons deported. The four grounds of deportation that did not cause termination of benefits might have been excluded for compassionate reasons or as *de minimis.* Nor could a punitive motive be inferred from the failure of Congress to apply section 202 (n) to beneficiaries voluntarily residing abroad.

> Congress may have failed to consider such persons; or it may have thought their number too slight, or the permanence of their voluntary residence abroad too uncertain, to warrant application of the statute to them, with its attendant administrative problems of supervision and enforcement. Again we cannot with confidence reject all those alternatives which imaginativeness can bring to mind, save that one which might require the invalidation of the statute.[59]

Justice Brennan, in an opinion joined by Chief Justice Warren and Justice Douglas, dissented on the basis that section 202 (n) imposed punishment as an *ex post facto* law and without a judicial trial. In a

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[58] 363 U.S. at 617.

[59] *Id.* at 621.

separate dissent, Justice Douglas condemned the section as a bill of attainder. Justice Black dissented on a variety of grounds.

Kennedy v. Mendoza-Martinez (1963)[60]
Rusk v. Cort (1963)[61]

Mendoza-Martinez, who was born in this country of Mexican parents and who thus had dual nationality, left the United States and went to Mexico in 1942 for the purpose of evading military service and returned to the United States in 1946. He was convicted in 1947 of evading performance of his military obligation and served a sentence of a year and a day. In 1953 a deportation proceeding was begun against him on the ground that he had lost his American citizenship under Section 401 (j) of the Nationality Act of 1940.[62] That section, which was added to the act in 1944, provided: "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by . . . (j) Departing from or remaining outside the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States." The Attorney General's special inquiry officer ordered that Mendoza be deported as an alien, and an appeal to the Board of Immigration Appeals of the Department of Justice was dismissed. Mendoza then began action in the Federal District Court for the Southern District of California for a declaration that he was a citizen, that section 401 (j) was unconstitutional, and that the order for his deportation was void. After proceedings that need not be detailed, the District Court held that section 401 (j) was unconstitutional in light of *Trop v. Dulles* because it lacked a rational nexus to a specific power of Congress and because it was essentially penal in character and deprived the plaintiff of procedural due process. The Attorney General appealed, and the case was twice argued before the Supreme Court.

The plaintiff in the companion case, *Rusk v. Cort,* after receiving an M.D. degree from Yale University, accepted a position as Research Fellow at Cambridge University in 1951. He had properly registered for the draft. In February, 1953, while Cort was still in England, his local draft board in Brookline, Massachusetts denied his request for deferment and notified him to report within 30 days for a physical examination either in Brookline or in Frankfurt, Germany. Further notices to report for

[60] 372 U.S. 144 (1963).
[61] *Id.*
[62] 8 U.S.C. §§ 1101 *et seq.* (1970).

physical examination were sent him on June 4 and on July 3, without result. On August 13, the board notified him to report for induction on September 14, 1953. He failed to do so, and in December, 1954, he was indicted for violation of Section 12 (a) of the Selective Service Act of 1948.[63] Meantime, the British Home Office had refused to renew his residence permit, and in 1954 he and his family took up residence in Czechoslovakia. Cort applied at the American Embassy in Prague for a new passport in 1959. His application was denied on the ground that by failing to report for induction, as ordered, and remaining outside the United States, he had lost his American citizenship under Section 349 (a) (10) of the Immigration and Nationality Act of 1952, which had superseded section 401 (j).[64] After this decision was upheld in the State Department, Cort began action in the District Court for the District of Columbia for a declaration that he was a citizen, for an injunction against enforcement of section 349 (a) (10) because of its unconstitutionality, and for an order that a United States passport be issued to him. A three-judge court gave the demanded relief, and the Secretary of State appealed.

The Supreme Court, in an opinion by Justice Goldberg applicable to both cases, affirmed the judgments[65] and held sections 401 (j) and 349 (a) (10) invalid on the ground that Congress had employed deprivation of nationality as a punishment without affording the procedural safeguards guaranteed by the fifth and sixth amendments. Justice Goldberg stated: "The punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character. . . ."[66] Some of the cases cited to illustrate what Justice Goldberg chose to call "the tests traditionally applied" seemed to have little bearing on the problem before the Court. Three cases[67] raised the question whether an obvious and admitted punishment,

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[63] 50 U.S.C. App. § 462 (a) (1970).

[64] 8 U.S.C. § 1481 (a) (10) (1970).

[65] 372 U.S. at 186.

[66] *Id.* at 168.

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Id. at 168-69 (footnotes omitted).

[67] Wong Wing v. United States, 163 U.S. 228, 237-38 (1896); Mackin v. United States, 117 U.S. 348, 350-52 (1886); Ex parte Wilson, 114 U.S. 417, 426-29 (1885).

imprisonment at hard labor, signified an "infamous crime" within the reference of the fifth amendment to indictment by grand jury. Other citations were to tax cases[68] of the period before 1937, considerably different in spirit from more modern decisions.[69] A case twice cited, *United States v. Constantine*,[70] struck down a special excise tax of $1000 that was imposed on retail liquor dealers doing business in violation of local law, in addition to the excise tax of $25 exacted from all retail liquor dealers, on the ground that it was a penalty, disguised as a tax, which invaded the powers of the states. Justice Cardozo, in a dissenting opinion joined by Justices Brandeis and Stone, commented: "Thus the process of psychoanalysis has spread to unaccustomed fields."[71]

If Justice Goldberg's "tests traditionally applied" seem fictitious, that may explain his neglect to apply them. "Here, although we are convinced that application of these criteria to the face of the statutes supports the conclusion that they are punitive, a detailed examination along such lines is unnecessary, because the objective manifestations of congressional purpose indicate conclusively that the provision in question can only be interpreted as punitive."[72] There followed 14 pages of legislative materials, nine of which were devoted to what was called the predecessor statute, not identical in terms, which was enacted in 1865. Justice Stewart, dissenting, stated:

> In these cases, however, we have before us statutes which were enacted in 1944 and 1952, respectively. In construing these statutes, I think nothing is to be gained from the legislative history of a quite different law enacted by a quite different Congress in 1865, nor from the reports of still another Congress which amended that law in 1912. Unlike the 1865 law, the legislation at issue in the cases before us is *not* "in terms punitive." And there is nothing in the history of *this legislation* which persuades me that these statutes, though not in terms penal, nonetheless embody a purpose of the Congresses which enacted them to impose criminal punishment without the safeguards of a criminal trial.[73]

The concurring opinion of Justice Brennan, and the dissenting opinion of Justice Stewart which Justice White joined, considered whether the statutes embodied a valid regulation or an invalid punish-

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[68]Among these are: Lipke v. Lederer, 259 U.S. 557, 562 (1922) and Child Labor Tax Case, 259 U.S. 20, 37-38 (1922).

[69]*See, e.g.*, United States v. Sanchez, 340 U.S. 42 (1950) and Sonzinsky v. United States, 300 U.S. 506 (1937).

[70]296 U.S. 287 (1935).

[71]*Id.* at 299 (dissenting opinion).

[72]372 U.S. at 169.

[73]*Id.* at 204 (dissenting opinion).

ment. Justice Brennan, after analysis like that of his concurring opinion in *Trop v. Dulles,* concluded that expatriation was not rationally related to the war power, and was "cruel and unusual [punishment] here if it was there."[74] The opinion of Justice Stewart argued that section 401 (j) could properly have been enacted as an aid to civilian and military morale in wartime and that, so viewed, it was rational and efficacious.

> During the consideration of § 401 (j) in Congress there were repeated references to the expectation that fugitive draft evaders then living abroad would return to this country after the war to resume citizenship and to enjoy the fruits of victory. The effect upon wartime morale of the known existence of such a group, while perhaps not precisely measurable in terms of impaired military efficiency, could obviously have been considered substantial. Denationalization of this class of voluntary expatriates was a rational way of dealing with this problem by removing its visible cause.[75]

American Communications Association v. Douds (1950)[76]
United States v. Brown (1965)[77]

The common question in these two cases was whether related statutes were invalid as bills of attainder. Section 9 (h) of the National Labor Relations Act[78] denied certain benefits of the Act to any labor union that did not file with the National Labor Relations Board an affidavit by each of the union's officers that he was not a member of, or affiliated with, the Communist Party; nor a believer in or a member or supporter of any organization that believed in or taught the overthrow of the United States Government by force or by any illegal methods. Section 9 (h) was upheld in *Douds.*[79]

Section 504 of the Labor-Management Reporting and Disclosure Act of 1959,[80] which was enacted to replace Section 9 (h) of the National Labor Relations Act, as amended, made it a crime for a member of the Communist Party to serve as an officer of a labor union. Section 504 was struck down as a bill of attainder in *Brown.*[81]

Chief Justice Vinson's opinion of the Court in *Douds,* after stating that Congress might attempt to prevent political strikes and other kinds

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[74] *Id.* at 193 (concurring opinion).
[75] *Id.* at 210 (dissenting opinion).
[76] 339 U.S. 382 (1950).
[77] 381 U.S. 437 (1965).
[78] Act of June 23, 1947, ch. 120, § 9 (h), 61 Stat. 146.
[79] 339 U.S. 382 (1950).
[80] 29 U.S.C. § 504 (1970).
[81] 381 U.S. 437 (1965).

of action designed to burden interstate commerce, proceeded to recognize that Congress could rationally find that members of the Communist Party in positions of union leadership were likely to resort to political strikes. Section 9 (h) was not a bill of attainder, and *United States v. Lovett, Ex parte Garland,* and *Cummings v. Missouri* were inapposite.

> Those cases and this also, according to the argument, involve the proscription of certain occupations to a group classified according to belief and loyalty. But there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that § 9 (h) is intended to prevent future action rather than to punish past action.[82]

Douds, however, was treated in *Brown* as not controlling. Chief Justice Warren said in the opinion of the Court:

> Section 504, unlike § 9 (h), disqualifies from the holding of union office not only present members of the Communist Party, but also anyone who has within the past five years been a member of the Party. However, even if we make the assumption that the five-year provision was inserted not out of desire to visit retribution but purely out of a belief that failure to include it would lead to *pro forma* resignations from the Party which would not decrease the threat of political strikes, it still clearly appears that § 504 inflicts "punishment" within the meaning of the Bill of Attainder Clause. It would be archaic to limit the definition of "punishment" to "retribution." Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive.[83]

The opinion described the statute in *Lovett* as

> the product of a congressional drive to oust from government persons whose (congressionally determined) 'subversive' tendencies made their continued employment dangerous to the national welfare. . . . Similarly, the purpose of the statute before us is to purge the governing boards of labor unions of those whom Congress regards as guilty of subversive acts and associations and therefore unfit to fill positions which might affect interstate commerce.[84]

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[82] 339 U.S. at 413-14.

[83] 381 U.S. at 458.

[84] *Id.* at 460.

A true analogy to the problem of *Brown* was presented not by *Lovett* but by *Board of Governors v. Agnew*,[85] which the Court, in Justice White's words, "strenously—and unsuccessfully" attempted to distinguish. Justice White said, dissenting in an opinion joined by Justices Clark, Harlan, and Stewart:

> The statute involved in *Agnew*, § 32 of the Banking Act of 1933, 48 Stat. 194, as amended, 12 U.S.C. § 78 (1964 ed.), forbade any partner or employee of a firm primarily engaged in underwriting securities from being a director of a national bank. The Court expressly recognized that the statute was directed to the *"probability or likelihood"* that a bank director who was also a partner or employee of an underwriting firm *"may* use his influence in the bank to involve it or its customers in securities which his underwriting house has in its portfolio or has committed itself to take." 329 U.S., at 447. (Emphasis added.) And, as we noted in *Douds*, 339 U.S., at 392, "[t]here was no showing, nor was one required, that all employees of underwriting firms would engage in such conduct.[86]

The dissenting opinion posed the issue of the case in familiar terms. "When an enactment is challenged as an attainder, the central inquiry must be whether the disability imposed by the act is 'punishment' (*i.e.*, is directed at an individual or a group of individuals) or is 'regulation' (*i.e.*, is directed at controlling future conduct)."[87] And Justice White gave this answer: "In view of Congress' demonstrated concern in preventing future conduct—political strikes—and the reasonableness of the means adopted to that end, I cannot conclude that § 504 had a punitive purpose or that it constitutes a bill of attainder."[88]

Conclusion

An act of Congress can properly be invalidated as a bill of attainder, or as imposition of punishment without procedural due process, if the act either shows in its language a clear purpose to punish or is shown to lack a rational relation to any power of Congress. The legislative history can do no more than suggest a possibility that punishment was intended; and the same must be said of severity of the disability, and of historical attitudes towards it. An intention to punish should not be ascribed to Congress where an alternative exists. Thus, before a statute is held to impose punishment unconstitutionally, a court should ascertain whether

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[85] 329 U.S. 441 (1947).

[86] 381 U.S. at 465-66 (dissenting opinion).

[87] *Id.* at 462 (dissenting opinion). These also are terms of reference in Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 82-83 (1961).

[88] 381 U.S. at 478 (dissenting opinion).

the statute can rationally be considered a regulatory act. The choice between punishment and regulation seems to have been made correctly in *Ex parte Garland, Cummings v. Missouri, Flemming v. Nestor,* and *American Communications Association v. Douds;* and incorrectly in *Trop v. Dulles* and *United States v. Brown.* A purpose to punish is unmistakable in the text when named individuals are subjected to disability, as in *United States v. Lovett.* The only instance of condemnation of an act without consideration of its possible regulatory purpose occurred in *Kennedy v. Mendoza-Martinez* and the companion case *Rusk v. Cort;* such treatment may be considered an aberration. The bill of attainder clause was discussed in *United States v. Brown* as a function of the doctrine of separation of powers, but the decision appears to violate the doctrine in a sense opposite to that suggested by the Court.

TORT LIABILITY IN OIL AND GAS OPERATIONS IN MISSISSIPPI

*Arthur B. Custy**

This article is an analysis of various tort principles as applied to situations involving oil and gas interests and operators. The growth of the oil and gas industry in Mississippi has brought to the courts of that state causes of action which in many instances, because of the singular nature of the property and contractual relationships involved, invite re-examination of traditional tort concepts. As an initial consideration, it is important to distinguish an action derived from the principles of the law of torts from one in which the duty of the defendant is purely contractual in nature. The most widely recognized example of the latter situation is the utilization, in the context of the lessor-lessee relationship, of the prudent-operator standard.[1] Though it is in nature a tort concept, the prudent-operator standard derives its efficacy from the provisions of the oil and gas lease—whether express or implied. As such, the standard is applicable only in the situation where the litigants are lessor and lessee, and should not be considered, except by way of analogy, as a cause of action based on tort.[2]

The usual oil and gas lease provides that the lessee shall have the right to go upon the property for the purposes of exploring, drilling, and recovering oil and related products.[3] Such a grant is generally designated as being exclusive, but were it not, the right might be held to be co-extensive as between lessor and lessee.[4]

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[1]*See* Merrill, *The Modern Image of the Prudent Operator,* 10 ROCKY MT. MIN. L. INST. 107 (1965).

[2]*See* 5 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 806.3 (1972).

[3]*See* 1 E. BROWN, THE LAW OF OIL AND GAS LEASES § 3.06 (2d ed. 1967).

[4]Yates v. Gulf Oil Corp., 182 F.2d 286 (5th Cir. 1950); *see* Shell Petroleum Corp. v. Puckett, 29 S.W.2d 809 (Tex. Civ. App. 1930). *See also* Ready v. Texaco, Inc., 410 P.2d 983 (Wyo. 1966), where owners of federal leases granting exclusive rights of mining, extracting and removal of oil and gas deposits were held not to have exclusive rights as to exploration, and that the public could thus conduct geophysical operations upon the land. The decision was based on narrow grounds and has been superseded by federal regulation of permits. *See* Comment, *Non-Exclusive Rights of Lessees to Conduct Geophysical Exploration — Federal and Wyoming State Oil and Gas Leases,* 3 LAND & WATER L. REV. 103 (1968).

It is clear, however, that where there has been a severance of the mineral estate and exclusive rights of exploration have been granted, the surface owner is precluded from granting exploratory rights, since they are an incident of the estate of the mineral owner.[5] The wisdom of this view has been questioned as tending to stifle exploration,[6] but as noted, the exclusive nature of most exploratory grants has settled the matter.[7]

In terms of the liability of the explorer where damage occurs to the surface, the question resolves itself into two component parts: the nature and requirements of the cause of action upon which liability is predicated; and the measure of damages to be applied where liability is found to exist. There is no essential doctrinal difference between tort actions in which oil and gas exploration constitutes the conduct complained of, and other actions on a similar basis in which oil and gas is not a factor, but the distinctions are significant enough to warrant examination.

The most objective theory upon which liability can be predicated requires only that the element of causation be demonstrated. Applicable only in a limited range of situations, generally those involving the use of a dangerous instrumentality, the doctrine of strict liability appears to have a permanent place in oil and gas law.[8] This doctrine had its beginning in the case of *Rylands v. Fletcher*,[9] where the defendant was held responsible for the damages to the plaintiffs' mines by virtue of his allowing water to escape from a surface reservoir he had constructed. Liability was not predicated upon any showing of negligence, rather the court found that "the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape."[10]

The Mississippi position with regard to the application of the doctrine was set forth several years ago in *General Geophysical Co. v. Brown*.[11] The defendant had conducted geophysical explorations without plaintiff's permission and detonated a charge at a distance of 550 feet from the plaintiff's well. Thereafter, water in the well became dis-

[5]Beatty Oil & Gas Co. v. Blanton, 245 F. 279 (D. Ky. 1917).

[6]Hull, *Oil and Gas Lessee v. Seismograph Licensee*, 21 OKLA. B.J. 1503 (1950).

[7]Wilson v. Texas Co., 237 S.W.2d 649 (Tex. Civ. App. 1951).

[8]Green, *Hazardous Oil and Gas Operations: Tort Liability*, 33 TEX. L. REV. 574 (1955).

[9][1866] L.R. 1 Ex. 264, *aff'd*, [1868] L.R. 3 H.L. 330.

[10][1866] L.R. 1 Ex. at 279-80.

[11]205 Miss. 189, 38 So. 2d 703 (1949).

colored. Defendant returned a short time later and secured limited permission to conduct another test, the point used for the previous shot being excepted from the plaintiff's assent. Nevertheless, the second test was conducted at this same point and subsequently the plaintiff's well became muddy and failed to provide an adequate water supply. Plaintiff's declaration alleged that defendant had come upon the land "and without authority did then and there negligently, carelessly, wantonly and recklessly shoot and cause to be shot a test well,"[12] but the court found the allegations of negligence unnecessary as the defendant was a trespasser *ab initio* by virtue of its violation of the limited permission given by plaintiff. In this context, defendant was "liable for the damages to the property . . . without regard to the degree of care with which its explorations may have been carried on."[13]

The decision, of course, was grounded on the fact that the explorer was a trespasser and therefore liable for the results of his actions. A more refined version of this same question has occurred in situations where there was no physical entry on the landowner's premises, but the trespass was accomplished by means of shock waves set in motion by exploratory blasting.[14]

Prior to 1954, there was some question as to the Mississippi position where a defendant's blasting caused injury to an adjoining landowner.[15] Texas, to which the Mississippi courts had often looked when confronted with a novel question concerning oil and gas, had rejected any theory of strict liability when the use of explosives was involved.[16] Other jurisdictions, following the strict liability doctrine of *Rylands v. Fletcher,* had predicated liability solely on a showing of causal connection between the explosion and the injury suffered.[17] While common law tort concepts would have imposed strict liability where objects were thrown on a plaintiff's land as a result of an explosion, there was some question as to whether or not damage occasioned by shockwaves from the blast would receive similar treatment.[18] In *Central Exploration Co. v. Gray,*[19] the Mississippi Supreme Court held that where it was shown that the defendant's use of explosives had resulted in damages to the plaintiff's home by means of concussion, no showing of negligence was required.

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[12]205 Miss. at 207, 38 So. 2d at 705.

[13]*Id.*

[14]*See* Annot., 20 A.L.R.2d 1372 (1951).

[15]21 Miss. L.J. 289 (1950).

[16]Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221 (1936).

[17]*E.g.,* Exner v. Sherman Power Constr. Co., 54 F.2d 510 (2d Cir. 1931).

[18]Comment, *Liability for Substantial Physical Damage to Land by Blasting — The Rule of the Future,* 33 HARV. L. REV. 542 (1920).

[19]219 Miss. 757, 70 So. 2d 33 (1954).

Citing with approval a decision of the Second Circuit,[20] the court noted that:

> In every practical sense there can be no difference between a blasting which projects rocks in such a way as to injure persons or property and a blasting, which, by creating a sudden vacuum, shatters buildings or knocks down people. In each case, a force is applied by means of an element likely to do serious damage if it explodes. The distinction is based on historical differences between the actions of trespass and case and, in our opinion, is without logical basis.[21]

Attempts by the defendant to show that he had taken every possible precaution were to no avail. The court having accepted the strict liability standard with regard to explosives, such demonstrations were irrelevant.[22]

It would appear that there are three separate grounds for imposition of a standard of strict liability, or more precisely, three situations in which the standard of care is irrelevant. The first relates to the relationship of the operator with respect to the premises on which he is conducting his operations, *i.e.*, the liability of the trespasser. The second and third, related but nevertheless distinct, involve, respectively, the type of operation conducted, and particularly the trespass caused by the intrusion of shock waves set in motion by an exploratory shot.[23] It should be noted that while the trespasser is held strictly accountable for his actions, a different set of circumstances arises as between the trespasser, as in *Brown,* who has no claim to any degree of right in the land, and one who is operating lawfully or at least under some claim of right. The latter situation may be illustrated by *Cities Service Oil Co. v. Corley,*[24] where a lessor-lessee relationship was found to exist. In such a situation the court held that there must be allegations and proof of negligence in addition to establishment of the requisite causal connection.[25]

A second little-used cause of action is nuisance. In oil and gas jurisprudence the theory is generally confined to cases where there has been

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[20]Exner v. Sherman Power Constr. Co., 54 F.2d 510 (2d Cir. 1931).

[21]219 Miss. at 765, 70 So. 2d at 37.

[22]Other jurisdictions are in accord with the Mississippi view. *See* Fontenot v. Magnolia Petroleum Co., 227 La. 866, 80 So. 2d 845 (1955); Seismograph Serv. Corp. v. Buchanan, 316 P.2d 185 (Okla. 1957). Texas, however, has not retreated from the view enunciated in *Turner. See* Roskey v. Gulf Oil Corp., 387 S.W.2d 915 (Tex. Civ. App. 1965).

[23]*See* 1 WILLIAMS & MEYERS, *supra* note 2, § 217.

[24]197 So. 2d 244 (Miss. 1967).

[25]*Cf.* Sun Oil Co. v. Nunnery, 251 Miss. 631, 170 So. 2d 24 (1964); Union Producing Co. v. Pittman, 245 Miss. 427, 146 So. 2d 553 (1962).

an escape of a deleterious substance onto a plaintiff's land or into a stream which traverses it.[26] In many Mississippi cases the plaintiff has alleged negligence on the part of an operator, but liability has been predicted on a showing that the defendant in fact had created a nuisance.[27]

Although conduct which is by its nature negligent may give rise to a cause of action based on creation of a nuisance, negligence itself is not the *sine qua non* for establishment of liability. The basis of liability arises from the harm which a defendant's actions have produced with respect to a plaintiff rather than his care or lack thereof.[28] At the one extreme are instances where the damage was intentional[29] and at the other, situations analogous to a strict-liability standard where the defendant's activities are of such a nature as to be unreasonable under the circumstances.[30]

Illustrative of this confusion as to causes of action is *The Southland Co. v. Aaron*.[31] There, the defendant's refinery had allowed crude oil to escape into a stream which traversed the plaintiff's land. The plaintiff had notified the refinery as to the condition of the stream and the damage its overflow was causing, but the pollution had continued. The plaintiff's allegations in respect to this damage were couched, apparently, in terms of negligence, *i.e.*, that the refinery was liable for allowing the oil to escape in the first instance. The court, however, chose to treat the allegations of negligence as surplusage and found that the defendant had created an actionable nuisance. It seems clear that the court was, in this instance, trying to provide more flexibility in dealing with cases of stream pollution. By allowing a recovery based on nuisance, the court gave to future plaintiffs a cause of action which might exist even if negligence cannot be proven,[32] and one which allows a more varied range as to recovery of damages.[33]

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[26]*E.g.*, The Southland Co. v. McDonald, 225 Miss. 19, 82 So. 2d 448 (1955); The Southland Co. v. Aaron, 221 Miss. 59, 72 So. 2d 161 (1954).

[27]Cases cited note 26 *supra*.

[28]*See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 87 (4th ed. 1971).

[29]*Id.* § 87, at 574.

[30]Commonwealth v. Miller, 139 Pa. 77, 21 A. 138 (1891), is an early example of the application of a nuisance theory to refineries.

[31]221 Miss. 59, 72 So. 2d 161 (1954). For an analogous decision in regard to adjoining property *see* The Southland Co. v. McDonald, 225 Miss. 19, 82 So. 2d 448 (1955).

[32]*Cf.* American Sand & Gravel Co. v. Rushing, 183 Miss. 496, 184 So. 60 (1938).

[33]For a discussion of the basic nature of the theories of nuisance and trespass *see* Keeton & Jones, *Tort Liability in the Oil and Gas Industry II*, 39 TEX. L. REV. 253 (1961).

Negligence is undoubtedly the most frequently utilized cause of action with respect to injuries caused by oil and gas operations. For liability to attach it must be shown that the operator breached the required standard of care, that the breach was the cause of the injury, and that there was actual damage to the aggrieved party.[34] The major obstacle to most of the suits brought against oil and gas explorers or operators is the establishment of causal connection between tortious action and the resultant claim.

In *Magnolia Petroleum Co. v. Williams,*[35] the operator drilled two oil wells from which about 12 barrels of salt water were taken daily. The salt water was placed in disposal pits located about 1000 feet from the landowner's water well. This well subsequently became polluted and salty, and the owner charged that the operator had been negligent in allowing seepage from his disposal pits. A jury verdict for the landowner was overturned by the Supreme Court of Mississippi on the basis that, although the evidence had shown that seepage did in fact occur, there was a failure to establish the requisite causal connection between such seepage and the pollution of the well. Had the landowner been able to establish that a sizeable amount of salt water did in fact escape, he might have thereby discredited other possible sources of pollution and carried his burden of proof.

Contrasting this case with a subsequent decision, the type of evidence which is required to establish the "causal connection" becomes apparent. In *Warren Petroleum Corp. v. Lee,*[36] the plaintiff alleged that the defendant-refinery had allowed salt water to escape into a stream which traversed his land, resulting in the illness and death of many of the plaintiff's cattle and in the destruction of the fishing value of the stream. The jury found for the landowner. On appeal, the defendant argued that the requisite causal connection had not been shown. It contended that the damage could have been caused by hog-slaughtering operations carried on adjacent to the stream at a point between plaintiff and defendant or, alternatively, that the evidence was insufficient to support a finding that salt was the principal factor resulting in the death of the stock and fish. The plaintiff, however, was able to prevail by mustering an impressive array of witnesses. He demonstrated to the court's satisfaction that health department tests showed that a substantial amount of seepage was taking place, that this seepage also affected the upstream hog farm, and that autopsies had shown that the cattle and fish died as a result of excessive salt intake.

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[34] PROSSER, *supra* note 28, § 30.

[35] 222 Miss. 538, 76 So. 2d 365 (1954).

[36] 234 F.2d 207 (5th Cir. 1956).

Circumstantial evidence may be useful to a plaintiff in this situation, as in the case of *Magnolia Petroleum Co. v. Stinson.*[37] There, several of the plaintiff's sheep had died. Their sole source of water was a stream which traversed the plaintiff's land after passing an oil well operated by the defendant. Discovering that his sheep were being somehow poisoned, the plaintiff noticed that the stream was muddy, and tracing its course upstream found that there were several bags of drilling chemicals at the defendant's well site. The bags were open and it was apparent that the overflow from the unlevied slush pit would carry the mud and chemicals into the stream. Subsequently, the landowner took a sample of the water, which showed heavy concentrations of the same chemicals present at the drill site. This type of evidence, the court felt, was sufficient to take the element of causation out of the realm of mere speculation so as to provide a jury with a legitimate inference susceptible to resolution. It is probable that without the water sample the plaintiff's case would have failed.

This type of situation might logically suggest the application of the doctrine of res ipsa loquitur, but as will be seen, its utility is somewhat limited. The inherent limitations in the doctrine stem from the fact that one of the prerequisites for its application is an acceptable demonstration that the harm occasioned could, in the normal and probable course of events, only have been caused by an instrumentality under the control of the purported tortfeasor. Therefore, no recovery may be had in a tort action where there are several plausible causes of the injury, some of which do not involve the negligence of the party charged.[38]

In *Interstate Oil Pipe Line Co. v. Valentine,*[39] the oil company's pipeline, which was located near the plaintiff's stream, cracked and permitted oil to escape into the stream. As a result, several cattle died and the value of the remaining animals was reduced because of weight loss. Apparently, there was no question as to the cause of the injuries or their source. The trial judge instructed the jury that if they found that the damage would not have occurred had the defendant exercised reasonable care, then a decision for the plaintiff should be rendered. The Supreme Court of Mississippi upheld the instruction on the basis of the doctrine of res ipsa loquitur, noting that the plaintiff had failed to introduce any evidence to the effect that the pipe itself was defective—this being the only probable alternative in such a factual context.

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[37]230 Miss. 533, 93 So. 2d 815 (1957).
[38]PROSSER, *supra* note 28, § 39.
[39]236 Miss. 400, 110 So. 2d 369 (1959).

The plaintiff's failure to carry the burden of proof illustrates the principal limitation upon the use of res ipsa loquitur in the context of oil and gas operations. The doctrine applies in cases where the fact that someone was injured gives rise to an inference that someone else, the defendant, was negligent. The application of the doctrine is limited by certain well-defined principles. First, the surrounding circumstances must show that the injury was of a type that would not have occurred unless someone was negligent. Second, the circumstances must indicate that the defendant had exclusive control of the instrumentality which caused the harm, or alternatively, the plaintiff must eliminate every other reasonable possibility as to causation.[40]

In *Shell Oil Co. v. Ainsworth*,[41] the plaintiff charged that the oil company had allowed a foreign substance to enter a watercourse connected to the plaintiff's watering pond, thereby destroying the value of the property. Analysis of water samples had shown that the alkalinity content was abnormally high, but the plaintiff failed to have the samples examined to determine the exact nature of the foreign material. Therefore, even though the defendant's oil well was located in the area, the plaintiff could not, simply on the basis of the fact that a foreign substance was present, establish the requisite causal connection between the operator of the well and the contemporaneous pollution of the pond.[42]

The question of the liability of a trespasser whose drilling efforts result in a dry hole has been the subject of a great deal of controversy among legal writers,[43] and has resulted in case law reflecting two divergent points of view. The opinion of many states,[44] and perhaps Mississippi,[45] is reflected in the decision of the Texas Supreme Court in *Humble Oil & Refining Co. v. Kishi*.[46] In this case Kishi was the surface owner and had a three-fourths undivided interest in the mineral estate, the remaining one-fourth belonging to Lang. Kishi executed a lease to Humble on December 23, 1919, but Lang's signature and delivery were not obtained by Humble until January 29, 1920. The lease pro-

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40PROSSER, *supra* note 28, § 39.

41247 So. 2d 815 (Miss. 1971); *cf.* Gulf Ref. Co. v. Davis, 224 Miss. 464, 80 So. 2d 467 (1955).

42*See* Jones, *Escape of Deleterious Substances: Strict Liability vs. Liability Based on Fault*, 1 ROCKY MT. MIN. L. INST. 163 (1955); Keeton & Jones, *Tort Liability and the Oil and Gas Industry*, 35 TEX. L. REV. 1 (1956).

43*See* 4 W. SUMMERS, THE LAW OF OIL & GAS § 660 (Rev. perm. ed. 1962).

44*See, e.g.*, Matheson v. Placid Oil Co., 212 La. 807, 33 So. 2d 527 (1947).

45*See* Hunt Oil Co. v. Berry, 227 Miss. 234, 86 So. 2d 7 (1956).

46261 S.W. 228 (Tex. Civ. App. 1924), *rev'd*, 276 S.W. 190 (1925), *set aside and remanded on rehearing*, 291 S.W. 538 (1927), *decision on appeal of remand*, 299 S.W. 687 (Tex. Civ. App. 1927).

vided for a 3-year primary term, and on January 23, 1923, Humble, over the objections of Kishi, began operations on the property, assuming the lease to be in force until the anniversary date of January 29th. The drilling efforts resulted in a dry hole, and Kishi filed suit for the diminution of the leasing value of the property. The court found that Humble's actions, based on a claim of right which it did not have, constituted a destruction of the value of the property, and that Kishi was entitled to recover to the extent of his interest in the market value thereof. The nature of the trespass was deemed to be irrelevant to the decision.[47] Kishi did not offer proof of any special damages, and the award was made on the basis of market value rather than the loss of a tangible leasing offer.[48]

Under an analogous fact situation the Wyoming Supreme Court in *Martel v. Hall Oil Co.*[49] held that the trespasser incurred no liability by his actions. Concluding that the action was one for disparagement of title, the court reasoned that the plaintiff's cause must fail because the falsity of the disparagement was disproved by virtue of a dry hole being drilled. The actual value of the mineral rights was not presented; but under the court's reasoning such value would have been irrelevant in any case, as would the question of good faith on the part of the trespasser.[50]

Clearly, both *Kishi* and *Martel* are subject to criticism.[51] However, other jurisdictions have adopted the reasoning of the former while at the same time making determination of liability more equitable

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[47]276 S.W. 190.

[48]291 S.W. 538. For a discussion of damages in oil and gas leasing *see* 4 SUMMERS, *supra* note 43, § 660.

[49]36 Wyo. 166, 253 P. 862, *rehearing denied,* 36 Wyo. 166, 255 P. 3 (1927).

[50]*See* 1 WILLIAMS & MEYERS, *supra* note 2, § 229.

[51]As to *Kishi,* Professor Green concludes that damages could not have been recovered in a trespass action of ejectment because damages may be awarded only as to actual injury to the land. A tort action is likewise excluded since damages are limited to those relating to a wrongful intrusion and actual injury, and finally, there can be no cause of action founded on slander of title since no malice was shown. *See* Green, *What Protection Has a Landowner Against a Trespass Which Merely Destroys the Speculative Value of His Property,* 4 TEX. L. REV. 215 (1926). In regard to Martel, one author has wryly commented that:

> from the standpoint of the oil operator, it is perhaps unfortunate that the theory applied . . . has not been adopted throughout the country. It would certainly facilitate expeditious handling of stubborn landlords who expect to be paid a reasonable market value of the right to conduct exploratory drilling operations on their land.

Castleberry, *Tort Liability in Oil and Gas Operations,* 4 ROCKY MT. MIN. L. INST. 281, 299 (1958).

by requiring that the injured party show the loss of a specific sale or lease before a determination of damages will be made.[52]

In *Hunt Oil Co. v. Berry*[53] the Mississippi Supreme Court may have adopted this view. Here, Berry had executed an oil and gas lease on 620 acres to Hunt, containing a 10-year primary term and authorization to pool any part of the leased premises with surrounding lands so long as the units did not comprise more than 40 acres each. Based on the misrepresentations of Hunt's agent, Berry agreed to amend the lease, believing that the primary term would be extended solely as to a particular 40-acre tract, when, in fact, the actual import of the amendment was to extend the term as to the entire acreage. Berry subsequently leased a portion of the original tract to Earl Wilson, who upon discovering the recorded amendment refused to complete the bargain. Hunt's operations resulted in a dry hole and Berry brought suit for the loss of the sale to Wilson as well as destruction of the speculative value of the remainder of the property.

Here, as in *Marsh,* the plaintiff's allegations were couched in terms of slander of title. Damages were awarded as to the loss of the lease to Wilson, but loss of any speculative value of the property was denied as being indefinite and uncertain. However, no mention is made as to the necessity of a showing of malice. In the absence of this element, and assuming that the court did not equate it with fraud, it is arguable that the decision may be characterized as following the rationale of the *Marsh* decision.[54]

This brief summary indicates that many of the traditional tort concepts have undergone alteration when applied to oil and gas situations. In some instances the change involves the application of a well recognized principle in a new context, while in others, such as the *Kishi* case, it involves the creation of a new tort concept.*

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[52]*E.g.,* American Surety Co. v. Marsh, 146 Okla. 261, 293 P. 1041 (1930); *see* Moses, *Unauthorized Use of Confidential Oil Information,* 1 ROCKY MT. MIN. L. INST. 267 (1955).

[53]227 Miss. 234, 86 So. 2d 7 (1956).

[54]This position is taken by 1 WILLIAMS & MEYERS, *supra* note 2, § 229, at 407.

*The author chose purposely to make this a non-conclusory article. As stated in the text, his intention was to point out recent developments in the field for the reader's consideration.

PSYCHOLOGICAL FUNCTIONS IN THE TEACHING OF CRIMINAL LAW

*Samuel M. Davis**

Introduction

Law has been accused of being irrelevant to the vast social and economic problems generated by an age of increasing scientific and technological development. Law, say the critics, has not been a positive force for social change but has instead awaited the development of human crises before responding to the demands of social problems.[1] The conflict between the competing interests of social change and stability, and the role of law in reconciling those interests is not a recent development but one observed by Roscoe Pound some time ago. He noted that law must constantly change in order to meet the needs of a changing social order.[2] However, if the criticism is correct, society possesses an accelerating capacity for change that is greater than the ability of the law to change with it. Indeed, it is fair to say that law has been reactive rather than activist in nature, which does not speak well of its success in meeting the challenge of social and technological change.

That law has a challenge to meet is not in doubt. One observer as early as 1933 was led to make the following comment, which to him was a tired truism: "There is nothing new in the proposition that law should change to meet new developments in our social and economic life."[3] If this proposition was not original in 1933, it is certainly not a novelty today. The observer, however, sought to distinguish his own period from those preceding it. While recognizing that the proposition stated was not a newly discovered truth, he went on to add: "But today the tempo of change in society is faster than ever."[4] If he was impressed with the tempo of the changing social

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The author would like to acknowledge a great personal and intellectual debt to Dr. Andrew Watson, whose many writings dealing with the impact of psychiatric experience on legal education spawned the ideas discussed in this article.

[1]Miller, *Drawing the Indictment,* Saturday Review, Aug. 3, 1968, at 39.

[2]R. Pound, Interpretations of Legal History 1-2 (1923).

[3]Keyserling, *Social Objectives in Legal Education,* 33 Colum. L. Rev. 437 (1933).

[4]*Id.*

order of the early thirties, he would be blinded by the incredibly complex, faster-than-the-speed-of-light pace of modern scientific and technological change.

Our legal system is currently under stress from a number of social changes generated by the technology resulting from scientific inquiry and knowledge: the burgeoning population; the capability of nuclear destruction; the exploration of outer space with its uncertain potential; problems of the environment, especially the pollution of food, air, soil, and water resources; and the impact of social conditions on the lives of the have-nots, who historically have been excluded from the existing order and therefore denied access to the traditional processes of change.[5]

These current social and economic conditions might be evaluated in terms of this further observation by the writer who in 1933 offered this response to the conditions prevalent in his own time: "If the law is to be an implement rather than an impediment to progress, it must respond rapidly and sensitively to the needs upon which it touches."[6] This analysis is no less valid today. Because of the special problems created by science and technology, lawyers will be compelled to develop new problem-solving techniques, particularly those that cross disciplinary lines and require "communication, interaction, and collaboration among lawyers and other specialists not ordinarily on common professional or disciplinary speaking terms."[7]

The plea for invoking the aid of other disciplines, particularly the social sciences, is a significant recent development in legal education, although perhaps the case for infusing the social sciences into law has been overstated. As presently framed, the proposition is too awesome. It suggests that to understand the special discipline of law and its relationship to other disciplines one must consistently tap the vast resources of modern psychology, economics, sociology, criminology, and so on. The enormity of the assignment is overwhelming.[8]

The problem can be stated more modestly. It is not required that law teachers have at their command a mastery of the entire breadth of social sciences and related disciplines. Specific problems simply go beyond the limits of traditional legal sources and require specialized knowledge relevant to the immediate task. Viewed in this perspective the problem is confined to a manageable scope. It does not require the wholesale integration of law and the social sciences. With respect

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[5]Frampton, *Scientific Eclat and Technological Change: Some Implications for Legal Education*, 63 MICH. L. REV. 1423, 1433-34 (1965).

[6]Keyserling, *supra* note 3, at 437.

[7]Frampton, *supra* note 5, at 1433.

[8]Currie, *Law and the Future: Legal Education*, 51 NW. U.L. REV. 258, 266 (1956).

to the aggregate of specific problems, what is lacking in the law and hence legal education is knowledge of "certain things that we need to know in order to form critical judgments."[9]

This concise statement of the problem frames the issue that will be the subject of this article. More specifically, the approach will be to examine how one discipline—psychiatry—can furnish information about ourselves and about our subject matter, in one area of law—criminal law—in such a way that we can "know certain things" that will enable us to "form critical judgments."

I. The Problem: Introduction to the Two Functions of Psychiatry

Just as law must change to meet the demands of our changing social order, specific areas of law must meet the challenge with varying degrees of sensitivity. The response of criminal law is particularly critical, because criminal law is concerned with "people problems,"[10] and because the legal profession faces an inability to provide adequate legal services to criminal defendants.[11] According to Professor B. J. George.[12] symptomatic of the latter problem is the fact that many lawyers—particularly those who practice in the large cities—do not participate in the defense of criminal defendants. He enumerates several reasons that are offered to explain this nonparticipation by a large segment of the bar. The first of these is that criminal practice is not very lucrative. This argument, he says, is refuted by the bar's image of professionalism, which implies service to meet community needs rather than the offering of skills in return for money. Another reason is that one meets too many ethical problems in criminal practice, but Professor George questions whether the ethical hazards which inhere in criminal practice are

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[9]*Id.* at 266.

[10]This phrase was coined by Dr. Andrew Watson who holds a joint appointment at the University of Michigan as Professor of Psychiatry in the School of Medicine and Professor of Law in the School of Law. A large part of this article is devoted to a presentation and analysis of his nontraditional, psychiatry-oriented approach to legal education.

[11]In addition to the United States Supreme Court's decision in Gideon v. Wainwright, 372 U.S. 335 (1963), requiring counsel in all felony cases, the Court's recent decision in Argersinger v. Hamlin, 407 U.S. 25 (1972), requiring counsel in misdemeanor cases, has added to an already serious problem. The wisdom of the Court's decision and the basis on which it is founded are not questioned. Reality, however, suggests that implementation of the decision will present great difficulty.

[12]Professor George is currently on the faculty of the Wayne State University School of Law although at the time he wrote the article mentioned here he was a member of the faculty of the University of Michigan School of Law.

greater than those in civil practice. Another, closely associated reason often advanced is that criminal practice results in loss of other clients through guilt by association attitudes held by the lay public. As Professor George points out, regardless of the truth of this assertion, popularity is not a fundamental requisite of professionalism.[13]

He finds none of these arguments particularly persuasive and concludes, therefore, that the lack of participation in criminal defense work stems from a basic antipathy toward criminal law.[14] He further urges that the origin of this antipathy is in the law school, where the study of substantive criminal law in particular seems to have little appeal for many law students.[15]

Even if the arguments refuted by Professor George are conceded, they do not explain satisfactorily the absence of any significant interest in criminal law. This is not to say that the lack of interest cannot be determined, only that the above reasons fail to pinpoint it. If Dr. Andrew Watson is correct in his hypothesis,[16] the loss of interest is principally

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[13]George, *The Imperative of Modernized Criminal Law Teaching*, 53 KY. L.J. 461, 461-62 (1965). A second indication of the inadequacy of legal services to criminal defendants, especially indigent defendants, is the low level of professional standards found in criminal practice in metropolitan areas. A few reputable attorneys are to be found who participate almost exclusively in the defense of the criminally accused. But many others, in a rather haphazard fashion, literally practice out of their hats. Professor George describes it aptly: "They solicit clients in the courtroom and corridors, hire jailors and court attendants to steer defendants their way, have tie-ins with bailbondsmen, split fees for referrals from other lawyers and suborn perjury by witnesses." *Id.* at 462.

Professor George argues that still another symptom of the inadequacy is the fact that rules of professional conduct are no longer relevant to a modernized criminal practice. For example, while the fundamental principle of the rule against advertising is generally acceptable, it fails to cope with the tactical problem of one who has just been arrested and is not only without a lawyer but, more importantly, is without sufficient knowledge upon which to base his choice. *Id.* at 463.

[14]*Id.* at 462.

[15]Dr. Watson has observed that higher ranking students have a greater antipathy toward criminal law than others. Watson, *Reflections on the Teaching of Criminal Law*, 37 U. DET. L.J. 701 (1960). While this may have been true 15 years ago, it does not seem so today. Law students increasingly are exhibiting an acute sense of social consciousness and questioning established values. Judge Justine Wise Polier has made the following observation: "There are signs of change in our law schools, where fewer students see acceptance by a big Wall Street firm as the be-all and the end-all of professional achievement. More first-rate students are exploring the opportunities for use of their skills in civil rights, in family law, in work with the poor, and in public administration." J. POLIER, THE RULE OF LAW AND THE ROLE OF PSYCHIATRY 162 (1968). Criminal law, because it deals with human and social problems, also must be considered one of the areas to which law students are beginning to turn.

[16]*See* note 10 *supra.*

caused by internal psychological conflicts engendered by substantive criminal law.[17] This problem is indicative of the need for what might be designated the "internal function" of psychiatry as applied in the teaching and study of criminal law. This internal function deals with the psychological problems encountered within the student himself when he is exposed to criminal law materials. Specifically, the internal function is addressed to the student's responses to these materials, the anxiety that he feels in dealing with them, the defenses that he creates in order to cope with the anxiety, and, ultimately, the attitudes that he carries away from his study of criminal law.[18]

On the other hand, a separate and clearly distinct function of psychiatry exists quite apart from what has been described as the internal function. This second function, though related to the first, extends in the opposite direction, toward the substantive problems of crime in its social setting. How is "blame" to be divided between the person who commits the act and the persons and environment which laid the groundwork for the act? This is illustrative of but one of the underlying problems of our system of criminal justice. Law students need an adequate background in psychiatry and other disciplines in order to understand these problems and their relation to the study of criminal law.[19]

Those trained in areas other than law are seeking, urgently and in increasing numbers, a solution to these problems, while the contribution of the legal profession lags behind.[20] Recent developments in legal education, however, indicate an increased use of interdisciplinary studies, particularly in the area of criminal law, which may reduce the law school's isolation from the other disciplines.[21] An understanding of psychiatric principles has a definite place in law school, because lawyers, and law students, face human problems every day and need an adequate understanding of human behavior to aid them in their solutions to these problems.[22] This is descriptive of what shall be designated the "external function" of psychiatry as it might be used in the study of criminal law. The external function, unlike the internal function, does not seek to help the law student better understand himself; it is directed outward rather than inward. It seeks to inter-

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[17]Watson, *Teaching Criminal Law, supra* note 15, at 701-02.

[18]George, *supra* note 13, at 466-67.

[19]Reich, *Toward the Humanistic Study of Law,* 74 YALE L.J. 1402, 1405 (1965).

[20]George, *supra* note 13, at 465.

[21]Frampton, *supra* note 5, at 1438, 1441.

[22]*See* Watson, *The Law and Behavioral Science Project at the University of Pennsylvania: A Psychiatrist on the Law Faculty,* 11 J. LEGAL ED. 73, 74 (1958).

relate law and psychiatry, each of which is concerned with the management, prevention and control of antisocial behavior.[23] Dr. Sheldon Glueck defined the problem clearly and in doing so stated the goal of the external function:

> For better or for worse, society has entrusted the administration of justice to lawyers—not to psychiatrists, not to sociologists, not to cultural anthropologists. But if criminal justice is to be substantially bettered, its administrators must be equipped with more than a knowledge of law. They must have enough acquaintance with the basic concepts of the motivational and human-relational disciplines to bring into play the insights these may offer in the more effective control of behavior. Further, the administrators of justice must have the motivation to conceive their job in terms of a dedicated vocation employing not only the verbal tools of legal logic but the dynamisms involved in the understanding and modification of human attitudes, motives and conduct.[24]

If law, particularly criminal law, has failed to adapt to the constantly evolving social and technological changes, the reason for the failure may be that we do not possess sufficient knowledge about things that we ought to know, "things" that exist quite apart from the traditional discipline of law.[25] From this point, our inquiry will be turned toward a closer examination of the force and application of the internal and external functions of psychiatry, admittedly with the zeal of one who, to borrow Justice Frankfurter's expression, has "grown wise without years."[26]

II. The Problem of Internal Conflict

A. Emotional Involvement with the Materials

Professor George and Dr. Watson agree that the roots of the antipathy toward criminal law go very deep. The real problem is basically one of attitudes formulated during the legal education process, attitudes that derive from the internal conflicts evoked by exposure to criminal law materials.[27] Each of us possesses the same drives that motivate the criminal, but we possess also the control measures that direct and restrain these drives.[28] Conflict is aroused as the student perceives that he possesses the same capacity to commit criminal acts as the criminal,

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[23]P. Roche, The Criminal Mind 4 (1958).

[24]S. Glueck, Law and Psychiatry: Cold War or Entente Cordiale? 168 (1962).

[25]Currie, *supra* note 8, at 266-67.

[26]Frankfurter, *Law and the Future: Foreword*, 51 Nw. U.L. Rev. 163, 164 (1956).

[27]George, *supra* note 13, at 466.

[28]Watson, *Teaching Criminal Law*, *supra* note 15, at 702.

and that the only buffer that separates him from the criminal is the particular character-molding process that somehow succeeded in imparting to him the sufficient control mechanisms with which to confine his conduct within acceptable limits—*i.e.*, within "the law." This is not to say that only a gossamer veil of restraint separates each of us from becoming a criminal. To the contrary, only an exceptional—and, therefore, unlikely—combination of circumstances will cause one to commit an act so deviant that imposition of the criminal sanction becomes necessary. But significantly, exposure to the mere *capacity* to experience the same basic drives of the criminal and to commit a forbidden act is unsettling.[29]

The study of criminal law and discussion of criminal cases stir memories of repressed drives—drives shared with the criminal—and the student becomes emotionally involved. Emotion cannot be erased; it must be mastered. While most law students do master this emotion, they do so in a way that is harmful to them.[30] A view that emotion should be eliminated seems to persist in law.[31] This attitude is harmful for the simple reason that emotion cannot be eliminated, nor is any attempt at elimination a healthy endeavor. As Dr. Winfred Overholser puts it, one of the chief features of

> Freudian psychology is that our conduct, thinking, and perceiving are always colored by emotion, that our feelings affect all of our mental life and behavior. . . . Temperaments are different. . . . These temperamental differences color all thinking and acting.[32]

Dr. Overholser continues, quoting Dr. Wilfred Trotter: " 'All processes of reasoning, however abstract, are participated in and influenced by feeling. We cannot separate off the reasoning process as such and set it to work in an emotional vacuum.' "[33] Yet, "legal thinking" seeks to do just this, as Dr. Overholser observes: "One of the fundamental assumptions of the law . . . is that most acts are done on a basis of reasoning and a weighing of the pros and cons."[34]

At any rate, the cases compel one to deal with his own feelings and to examine himself in relation to the fact situations in the cases. This personal identification with the material produces a searching

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[29]George, *supra* note 13, at 466.

[30]Watson, *Teaching Criminal Law*, *supra* note 15, at 702.

[31]Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91, 131 (1968).

[32]W. OVERHOLSER, THE PSYCHIATRIST AND THE LAW 19-20 (1953).

[33]*Id.* at 20.

[34]*Id.* at 41.

self-evaluation epitomized, to the student's horror, by the feeling that he could have found himself in similar circumstances behaving in the same manner.[35] Obviously it is difficult under these circumstances to view the behavior as morally blameworthy; yet the cases suggest, indeed demand, that conclusion. This feeling is best illustrated by the student's reaction to the famous case of *Regina v. Dudley and Stephens,*[36] in which sailors, cast adrift in a lifeboat, are compelled to kill and eat one of their fellows in order to survive. The case seemingly has no legally acceptable answer, and the student realizes that this case does not contain the sort of criminality he expected to encounter. He does not see "criminals" in this case. He sees people like himself. He is forced to consider his own response in an analogous situation. The question is profoundly disturbing; yet, because the situation lends itself so readily to personal involvement, he is compelled to confront his conscience.[37] The result may involve great internal conflict.

This inner conflict must in some way be reconciled. The student is faced with the biological, self-protective decision to "fight or flee,"[38] and must in some way cope with the anxiety that results from his great internal conflict. He may create defenses that will relieve his uneasiness;[39] he may resort to repression.[40] As Freud pointed out

> impressions, experiences, teachings, many of them consciously forgotten, are nevertheless stored in . . . the unconscious. . . . Unpleasant experiences may be repressed, so that they are ap-

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[35]Watson, *Teaching Criminal Law, supra* note 15, at 705.

[36][1884] 14 Q.B.D. 273.

[37]This is but one example of cases that are so easily susceptible of personal emotional involvement. Many other areas exist, particularly crimes of "morals" dealing with homosexuality, prostitution, drugs, alcohol, and the like, in which the student may find himself emotionally involved. He has feelings, attitudes, and drives, and he experiences great difficulty in examining these cases with the same cold rationale with which he might examine, for example, the distinctions between the different types of theft. More importantly, however, he has no available means with which to examine and cope with his own feelings and emotional responses.

[38]Watson, *Teaching Criminal Law, supra* note 15, at 706.

[39]OVERHOLSER, *supra* note 32, at 16: "Life is always a compromise, a process of adjustment, and not all the forces which are exerted upon any one person can be resolved. Therefore, defenses of one sort or another are necessary against these various conflicts."

[40]Repression is a process of forgetting. It is a means of defense. The individual pushes a painful episode, fantasy, or wish — often sexual or hostile — below the level of consciousness. It remains hidden in the recesses of the unconscious, threatening at any time to break through into consciousness . . . In order to keep such heavily charged and painful stimuli from consciousness, the individual has often to adopt methods of reacting which are essentially subterfuges and bribes.

M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 23 (1952).

> parently forgotten, yet they may come out in a disguised form, causing phobias, tics, anxieties, and various neurotic and even psychotic manifestations.[41]

The student may seek to insulate himself from what he has labeled "criminal" conduct. Seeing in himself the same capacity for criminality (although not the traditional, evil sort of criminality he expected) and experiencing a personal identification with the cases, he is understandably disturbed and unsettled. To free himself of this feeling he may project to others the capacity to commit evil acts, or he may deny the existence of evil acts together.[42] By denying the existence of evil or at least denying his capacity to commit evil, he expects to shed the personal identity with the materials that generated the stress in the first instance. Thus, his illusory sense of security is completed by delineating between himself (who does not know evil or who lacks capacity to commit it) and "them" (others to whom he has projected the capacity to commit evil).[43]

This source of anxiety and the resulting defenses are peculiar perhaps to the study of criminal law, since the psychological problems are generated by exposure to the criminal materials themselves. But another important source of anxiety and psychological stress exists in the general legal education process and is a large part of the psychological problem faced by the student of criminal law. Specifically, this is the problem of the law student's reaction to the case method and the Socratic method of teaching.

B. Reactions to Teaching Methods

Andrew Watson has pointed out that students who are drawn to the study of law share a number of misconceptions about law and

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[41] OVERHOLSER, *supra* note 32, at 14.

[42] George, *supra* note 13, at 466. *See also* OVERHOLSER, *supra* note 32, at 16: "We may have for example, repression, that is, a denial of the existence of a given situation. More commonly, perhaps, we tend to blame others for our shortcomings, and not infrequently to 'find' in others undesirable or blameworthy traits which we attempt consciously to repress in ourselves." The student may form a retributive view of punishment and may seek to punish in others the drives that he sees in himself or that he has repressed in himself. This especially may be true of his reaction to *Regina v. Dudley and Stephens.*

[43] George, *supra* note 13, at 467. The difficulty, of course, is that his sense of security is strictly illusory. Denial simply does not cause the problem to dissipate. Moreover, something more harmful occurs. When the student ceases to view crime and criminality as "people problems" and ceases to view these problems in their social context, he loses his personal feel for the individual and for the underlying problems of criminality. See pp. 659-60 *infra* and accompanying notes. Rather than something to be denied or shunned, however, understanding of the problems of crime on a human level is to be encouraged.

legal education. Most students, for instance, bring with them to law school a preconceived notion about the certainty of law.[44] This represents an essentially biological necessity, for each of us feels the need to master his environment[45] and to achieve orderliness and predictability in his relationships with others.[46] Some professions lend themselves readily to fulfillment of this need, and, to the uninitiated, law seems to be a profession of certainty and security. Perhaps the concept of *stare decisis,* actually very limited in its real function, is enticing to those who desire ordered patterns and certainty and feel that the law is an ultimate lodging place in which these qualities can be firmly secured. An anticipation of certainty can, upon discovery that the law is often equivocal, lead to disillusionment and extreme frustration.[47]

Another characteristic shared by beginning law students is the concern for expressing aggressiveness. Aggression as we shall use the term means "a set of biological drives which motivate one to attack the environment and make it do what the individual desires."[48] These drives are manifested by an urge to manipulate others, to shape and determine one's environment as he wishes, and to secure it as a satisfying place in which to function. These drives, if they receive proper direction, find expression in skilled advocacy in the adversary arena of the courtroom.[49]

Still a third characteristic that would-be law students manifest is the search for identity, which may be described as "the detailed and complex internal image which each person must develop of himself as he matures, which becomes a kind of model by which he patterns his life."[50] Constant evaluation of actual daily experiences in light of this image or model is one of the chief means by which we regulate our behavior.[51] At some point in their legal education, law students must incorporate into their identity a model of professionalism, by which to regulate their professional behavior. One of the functions of effective legal education then, is to furnish access to existing models of

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[44]Watson, *Teaching Criminal Law, supra* note 15, at 703.

[45]Watson, *Psychological Aspects of Legal Education, supra* note 31, at 101.

[46]Watson, *Teaching Criminal Law, supra* note 15, at 703.

[47]Watson, *Psychological Aspects of Legal Education, supra* note 31, at 101.

[48]*Id.*

[49]*Id.* at 102.

[50]*Id.* at 103.

[51]*Id. See also* OVERHOLSER, *supra* note 32, at 14-15, which states: "One thing which the growing child soon learns is to distinguish between himself and the outside world with its demands. This sense of reality which one develops is constantly in use for testing one's desires and instinctual drives."

professional behavior upon which the law student can draw in the construction of his own model.[52]

Although screening methods and strict admission policies seek only the best students for law school, all entering students are products of the same type of undergraduate instruction, essentially learning by rote. The student records in his memory a large amount of information and simply plays it back to the professor during the examination. Many may have escaped any real intellectual challenge before they reach law school. Consequently, when confronted with the rigors of the case method, they experience a great deal of anxiety, which ultimately may have a deteriorating effect upon them.[53]

The impact of the Socratic method also has a devastating effect on new law students. Some law professors engaged in the teaching of first-year classes express an almost sadistic glee as they set about destroying the preconceived values of first year law students. They seem to enjoy their task and view it as a holy mission to seek out and obliterate all of the unreasoned, fuzzy college ways.[54] Their search and destroy pursuit ostensibly is justified by its end, that of instilling in the students a sense of toughmindedness and an appreciation of rigorous analysis. Without a doubt this end is attained, but only at some undesirable costs to the student.[55]

The law student's usual response is that of anxiety, which may be revealed in any number of ways:

> When they first realize that they cannot be mere passive recipients of information, and when they have recognized that they do not even know what this process demands of them, their sense of helpless vulnerability will be manifested in a wide variety of symptoms. There will be jaw clenching, fingernail biting, restlessness, blushing, blanching, absenteeism, a spate of psychosomatic illnesses, and overt and recognized anxiety.[56]

Guttmacher and Weihofen also have described the general psychological response of one subjected to great external pressure and internal conflict, which seems particularly descriptive of the reaction of the typical law student:

> Not infrequently he feels acutely anxious and does not know exactly of what he is afraid. These emotional disturbances

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[52]Watson, *Psychological Aspects of Legal Education, supra* note 31, at 103-04.

[53]Watson, *Teaching Criminal Law, supra* note 15, at 711-12.

[54]The expression "fuzzy college ways" is not original but the creation of Professor Charles Reich. Reich, *supra* note 19.

[55]Watson, *Psychological Aspects of Legal Education, supra* note 31, at 109.

[56]*Id.* at 121.

> have the concomitant physiological signs and symptoms of fear: weakness and faintness, a pounding and rapid heart, shortness of breath, dizziness, sweating, blurring of vision, headache, an increase in blood pressure, diarrhea, etc.[57]

Anxiety may cause the law student to develop actual illness, either mental or physical, and he may even drop out of law school or fail some of his courses.[58] Or he may create a psychological defense to combat the feeling of anxiety.[59]

Of course, the best response to a stressful situation in which the student experiences anxiety is to solve the stress-generating problem, thereby eliminating it as a source of anxiety. He may do so by coping with the Socratic and case methods and manipulating them for his own purposes and benefit. This may occur only for a few students, however, who are able to develop their natural aggressive tendencies by understanding and manipulating, rather than falling victim to, the generally psychologically demoralizing teaching techniques. If successful, however, this is a healthy adaptation in which the student elects to "fight" rather than "flee" and manages to exercise his choice without experiencing an inordinate amount of inner conflict.[60]

Other adaptations are undesirable, however. One such defense is the continuing reliance on an evolving set of rules. If one set of rules fails, another set can be readily created. Continued reliance on rules as a means of solving problems conflicts with major goals in legal educa-

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[57]GUTTMACHER & WEIHOFEN, *supra* note 40, at 30.

[58]Watson, *Teaching Criminal Law, supra* note 15, at 712. Withdrawal may indicate a summary choice on the part of the student between "fight or flight" and may derive from "a failure to resolve satisfactorily an apparent conflict between personal standards of idealism and the self-image of a fledgling professional which the student holds, and the apparent preoccupation of the law with rules and specifics which the first-year curriculum so often suggests." George, *supra* note 13, at 467. Withdrawal also may result from the student's rationalization that "the study of law is not what he had contemplated" or that the financial burden is too great. Watson, *Psychological Aspects of Legal Education, supra* note 31, at 129. Or he may withdraw because he feels he is doing poorly and is failing to meet the high standards that he has set for himself, even though his actual achievement may be much higher than he believes it to be. *Id.* at 129-30.

[59]Watson, *Teaching Criminal Law, supra* note 15, at 712. *See* notes 40-43 *supra* and accompanying text.

[60]Watson, *Psychological Aspects of Legal Education, supra* note 31, at 125.

> By successfully overcoming the pressures of the Socratic technique, the student is developing the ability to deal with anxiety without using inappropriate defense maneuvers, which themselves limit and distort the skills which lawyers must possess. Thus, anxiety is being utilized in its biologically and psychologically appropriate way — to eliminate the stress source in adaptively successful ways.

Id. at 126.

tion,[61] but nevertheless many students will still use this method, principally to ease their anxiety. This is indicative of an emotional need in the student—a need that he cannot surrender until he develops a better solution.[62]

Still another adaptation, perhaps the most damaging of all, is the use of characterological defenses. Character adaptation is made necessary by the pressure of classroom tensions and anxiety, and to escape stress the law student may seek to become emotionally detached from his environment. To be sure, he is taught in law school that unemotional rationality is a desirable trait, but nevertheless, he is also responding to anxiety. Marked stoicism, emotional unresponsiveness, and cynicism about the human aspects of the lawyer's role are all indicative of characterological defenses.[63] This emotional detachment from "people problems" has especially been observed in criminal law. Judge Polier, quoting from an earlier work, has offered the following observation:

> Dr. Zilboorg assaulted the long-prized 'objectivity' of the law and saw it as a method by which judge and jury could comfortably remain at a psychological distance from the criminal. He criticized the law for its fear that psychiatry might understand the transgressor too well and might forgive too readily: "It is not really objectivity; it is more an effort to keep estranged from the criminal, to avoid knowing him, to look only on what he has done, on the act he has committed, to avoid any shortening of the psychological distance between the criminal and those concerned with judging and adjudging men."[64]

This represents a serious criticism of law and legal education. Legal education purports to be a character-building process. Law students are submitted to intensive questioning, probing, and analysis. Their statements are challenged and they learn to challenge others. They must defend their views against attack and in turn attack their opponents

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[61]Keyserling, *supra* note 3, at 438-39:

> The study of law as a 'body of technical doctrines more or less detached from those social forces which it regulates prevents students from grasping the actual workings of law in society. Verbal manipulation of the disembodied rule does not reveal either the original setting which called it forth, or the profound alterations in the societal structure upon which the rule may now be operating. The objection goes further: a lawyer so trained, far from comprehending the broader economic and social results of the law, is unlikely to understand its effect even upon the client whom he serves.

[62]Watson, *Teaching Criminal Law, supra* note 15, at 712.

[63]Watson, *Psychological Aspects of Legal Education, supra* note 31, at 130-31. The defense of cynicism "is a kind of characterological defense which enables a person to avoid the necessity of caring about people with its intrinsic capacity to stir up anxiety."

[64]Polier, *supra* note 15, at 2, *quoting from* G. Zilboorg, The Psychology of the Criminal Act and Punishment 39-41 (1954).

relentlessly. Only the hardy survive; it is not a game for the shy or timid. Ostensibly, passing through the baptismal fire imparts the prized objectivity to law students and strengthens them for the tasks that lie ahead. But rather than being a character-building process, legal education may very well shape character in a way that impedes efficient professional performance. Its teaching methods may destroy confidence and discourage comment, and its overemphasis on objectivity may render students insensitive to the human side of problems.[65]

The above discussion was intended to indicate the types of internal psychological difficulties that are present in legal education today. As pointed out, the internal problems derive from two sources: first, exposure to criminal law materials, with the consequent revival of repressed drives and identification with the fact situations, and, second, confrontation with the case method and Socratic method, which tend to dampen aggression and impede character development. Both sources of classroom stress tend to produce great inner conflict and anxiety, which in turn compel the student to create psychological defenses and which may, in some circumstances, compel him to withdraw from law school.

Related to these internal problems, which touch on a law student's ability to understand and cope with his own feelings and attitudes, is the external problem which deals with the law student's understanding of the materials. Both the internal and external problems are intertwined and are thus receptive to common solution. Before the solutions are proposed, however, one must grasp the significance of the external function served by psychiatry in the study of law so that it may be related to the problems already discussed.

III. The External Problem: Law's Isolation from Other Disciplines

The external problem is more apparent than the internal problem and for that reason easier to analyze. The problem, simply stated, centers around the failure of law and psychiatry to communicate along professional lines or to develop a common means of pursuit of shared objectives within the framework of scientific method.[66] At one time law and psychiatry had a great deal in common. Both the medicine man and the lawgiver were shrouded in mysticism, revered by other members

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[65]Watson, *Psychological Aspects of Legal Education*, *supra* note 31, at 131. This seems to suggest that legal education does more to destroy than it does to build character.

[66]Roche, *supra* note 23, at 4.

of society who believed them to be in close communion with the gods.[67] But apparently the two professions have never enjoyed a close communion with each other, despite the fact that each is concerned with human behavior and relationships.[68] Perhaps part of the reason for the lack of harmony lies in the differences between the educative processes of the two professions. Modern medical education stresses experimentation and exploration of the unknown, while simultaneously discouraging generalization, with all of its attendant scientific hazards; to the contrary, legal education emphasizes following traditionally established patterns and at the same time favors inductive reasoning, *i.e.,* drawing general propositions—or "rules"—from a great number of single instances.[69]

Too, the attitudes of law and psychiatry, as well as their respective approaches to problem solving, are different. Law tends to evaluate problems in terms of the absolute, whereas psychiatry utilizes a relativist approach, *i.e.,* law perceives problems in terms of black and white, while psychiatry tends to recognize gradations.[70] As an illustration, in determining the question of criminal responsibility, law is devoted to the dichotomy between complete sanity or complete insanity, with no recognition of intermediate shadings.[71] The widely followed M'Naghten rule,[72] for example, requires a totality of defect without considering the effect of a less than completely debilitating defect.[73] This formulation, as a test of

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[67]GUTTMACHER & WEIHOFEN, *supra* note 40, at 3. *See* Woodard, *The Limits of Legal Realism: An Historical Perspective,* 54 VA. L REV. 689, 691-94 (1968), for a discussion of the mysticism with which law once was regarded and how law was brought down to earth by rationalism.

[68]OVERHOLSER, *supra* note 32, at 6.

[69]GUTTMACHER & WEIHOFEN, *supra* note 40, at 3-4. In this respect, perhaps "the reason for this hesitation is that the law is in essence bound to be, to some extent at least, retrospective, that it must be based upon well-established precedents and upon generally accepted attitudes on the part of the public, if it is to have that force and vigor which it should have." OVERHOLSER, *supra* note 32, at 7.

[70]J. ROBITSCHER, PURSUIT OF AGREEMENT: PSYCHIATRY AND THE LAW 13 (1966):

> The psychiatrist sees everything in relative terms. If a patient announces that he has murdered his wife, or has decided to become a medical missionary to a colony of lepers, the psychiatrist will not classify these actions as, respectively, "bad" or "good": he will try to understand and to probe, and in the process he will try not be judgmental. Courts are, of course, judgmental.

[71]OVERHOLSER, *supra* note 32, at 45.

[72]M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843). The test as originally formulated was posed as follows: "it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." *Id.* at 722.

[73]In comparison, the test of criminal responsibility under the Model Penal Code requires only a *substantial* incapacity on the part of an accused "either to appreciate

mental capacity, runs counter to modern psychiatric knowledge and medical education,[74] but continues to endure, perhaps because it is ancient in origin and revered in the annals of the law,[75] again illustrating the law's tendency toward traditionally accepted approaches and its resistance to change.

Perhaps the reason for the absence of any significant amount of cooperation is more human than suspected and arises out of simple mistrust. Persons outside the legal profession have very fixed views about law and lawyers, ranging from a detached attitude of high respect to a frank and sometimes hostile mistrust and suspicion. The law's historical adherence to rigid self-containment and avoidance of contact with other disciplines renders critics and admirers alike reluctant to alter or relax their views.[76]

Whatever the reasons for the failure of law and psychiatry to work together in areas of common concern, the present fault with legal education is that the educational process does not necessarily provide young lawyers with the type of training that will enable them to furnish the best service possible in solving the kinds of problems they must face—*i.e.,* those problems that are intertwined with the processes of social and technological change.[77] The real problems—the *consequence* of the failure of law and psychiatry to communicate—as stated earlier, is that in legal education "we do not know certain things that we need to know in order to form critical judgments."[78]

If this is the problem, law must be liberated from its protracted isolation from other disciplines.[79] Psychiatry has much to offer law; its "liberating" function is essentially the external function mentioned earlier:

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the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01 (1) (Proposed Official Draft, 1962).

[74]The M'Naghten test was severely criticized in Durham v. United States, 214 F.2d 862, 870-74 (D.C. Cir. 1954).

[75]*See* Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 469 (1897).

[76]Frampton, *supra* note 5, at 1442.

[77]*Id.* at 1436.

[78]Currie, *supra* note 8, at 266. *See also* S. GLUECK, *supra* note 24, at 168-69:

> Today, the graduate of a good law school, if indeed he can at all be induced to practice what is often conceived to be the shady business of criminal law, possesses the training which with some experience enables him, as prosecutor or defense counsel, to do an acceptable job; or, as judge, to preside over a trial fairly under the rules of procedure and evidence. But when it comes to such discretion-exercising and crucially important functions as are involved, for example, in determining whether to prosecute or resort to commitment proceedings, or in selecting the most promising sentence, the typical lawyer is likely to be more or less at sea.

[79]Frampton, *supra* note 5, at 1436.

> Today psychiatry has reached the point where it can tell us some significant things about the very nature and need of law. It may seem startling to think of the psychiatrist as preceptor in legal, moral, and political philosphy, but by throwing light on man's potentialities for growth, and on the factors which lead individuals to retreat from maturity and growth, psychiatry helps law to focus on its goal, the development of the individual's potentialities for freedom and productiveness . . . . As individuals, we have only a one-eyed view of matters that call for synoptic vision. Truth is more likely to be found with the aid of a many-perspectived view.[80]

If law students are to understand criminal law and its relationship to crime rates, the psychological and social origins of criminal behavior, and means by which behavior can be changed or redirected, they must be given background information in the areas of psychology, psychiatry, sociology, and criminology. This is necessary not only for an understanding of how criminal offenders are to be treated after conviction, but is addressed to substantive issues as well. In the absence of such background knowledge, criminal law represents merely a set of magical rules designed to operate within society to implement desired results automatically.[81]

Law must be understood in its societal context. At the present time, law as a study of cases remains too much in the abstract. It needs to be "humanized" so that it touches people in their social relationships.[82] A background of knowledge in psychiatry can furnish an understanding of human behavior that will give greater depth and meaning to the otherwise abstract magical formulae of criminal law. Law in its largest sense is more than a set of rules; it is a social institution, endowed with tradition to be sure, but simultaneously possessing a capacity and impetus for change that touches the welfare of society as a whole and maximizes the freedom and equality of individual members of society.[83]

Only recently has psychiatry recognized law as a social institution.[84] But if law is to learn from psychiatry, emphasis must be directed away from the notion that answers to problems—particularly social problems—lie in strict adherence to principles of law, and more toward an examination of the causes of criminal behavior, potential methods of dealing with criminality, and the criteria by which abnormal behavior

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[80] GUTTMACHER & WEIHOFEN, *supra* note 40, at 11.
[81] Watson, *Teaching Criminal Law*, *supra* note 15, at 712.
[82] ROCHE, *supra* note 23, at 15.
[83] J. POLIER, *supra* note 15, at 31.
[84] *Id.* at 33.

is to be officially identified.[85] The furnishing of this information is psychiatry's external function in the teaching of criminal law.

IV. The Response of Legal Education to the Internal and External Problems

The internal and external problems that have been discussed necessarily lend themselves to common solution. The external function demands that psychiatric material and, ideally, a psychiatrist or psychoanalyst, be introduced into the law school curriculum. Once this is accomplished, the psychiatrist will be able to relieve some of the classroom tensions, thus accommodating the internal function. The presence of the psychiatrist is the real objective, because he can help the law student cope with his own feelings and can infuse into the law student's knowledge sufficient "nonlegal" information to help him analyze "legal" problems.

In some laws schools, the subject of psychiatry is introduced in the form of a third year seminar. Psychiatry, however, has many applications in courses that are taken earlier, some in the first year. Psychiatric material needs to be presented at these earlier stages if it is to be useful to law students in later stages of their education. Indeed, by the third year the attitudes of law students are so firmly molded that introduction of psychiatric material at that time may be ineffectual and certainly will be of little help as a tool of understanding.[86]

Because of already crowded first- and second-year curricula, introducing psychiatric material as separate and independent subject matter is difficult. A desirable alternative, however, is to incorporate such material into the existing curriculum structure. For example, psychiatric material may be introduced into criminal law and family law courses, both of which deal directly with problems of human behavior.[87]

The question naturally arises regarding the best means of introducing psychiatry into the law school curriculum. One point seems clear: the average law teacher, without training in the relevant background, is generally incompetent to teach such esoteric courses or seminars as, *e.g.*, law and psychiatry.[88] One approach, of course, is to have on the

[85]George, *supra* note 13, at 468.

[86]Watson, *A Psychiatrist on the Law Faculty*, *supra* note 22, at 75. "Just as a good law teacher forces his students to learn to analyze a case thoroughly before he reveals his own opinions, so the understanding of basic human motivations should precede considerations of how to manipulate them."

[87]*Id.*

[88]*See* Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 647 (1968).

law faculty a resident resource person who will participate in a collaborative teaching effort.[89] An alternative proposal would allow law faculty to obtain Ph.D. competence by pursuing doctoral studies in the relevant discipline. An even more attractive suggestion would provide a two-track system in legal education whereby law students whose principal desire is to practice could, after the first year, elect to continue in the J.D. program, while those primarily interested in academics would be free to pursue a Ph.D.[90]

Whatever method is employed, infusion of new matter into the law school curriculum is needed. The oftentimes dull school would be much more interesting and exciting from the point of view of the students if they felt they were receiving in their legal education experience that could not be acquired later in practice—experience that added uniquely to their skills or human understanding. These skills might not necessarily be of utility in the practice of law, but relate rather to economics, political science, philosophy, and similar disciplines.[91]

Certainly the "humanization" occurring in criminal law and the consequent need for a better understanding of human behavior are arguments in favor of the use of behavioral science teaching tools to complement legal materials.[92] Since the behavioral sciences can offer much valuable assistance to legal education, their treatment should not be superficial. Just as law is not easily understood from a moment's study, the concepts of the behavioral sciences also require a great deal of manipulation and application to different situations before one can grasp them and effectively use them as teaching tools.[93]

One excellent technique by which behavioral science information can be infused into legal education is through the use of clinical experience. The criminal law class, for example, can be taken to correctional institutions and mental hospitals to observe mental illness firsthand—something they can learn only abstractly in case books.[94] In one such clinical training experience, a criminal law class was taken to a mental hospital in the District of Columbia to observe a psychiatrist

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[89]Professor Bergin generally rejects the notion of having "house" resource persons trained in other disciplines, unless the resource person possesses a demonstrated interest in some aspect of law that will be enhanced in the law school setting. *Id.* at 651-52.

[90]*Id.* at 652-56. *See also* Reich, *supra* note 19, at 1405-06.

[91]Bergin, *supra* note 88, at 648-49.

[92]Foote, *The Law and Behavioral Science Project at the University of Pennsylvania: Family and Criminal Law*, 11 J. LEGAL ED. 80 (1958).

[93]Watson, *Teaching Criminal Law*, *supra* note 15, at 713.

[94]*Id.* at 716.

interview three patients who had been defendants in three cases[95] tried under the *Durham*[96] rule. The psychiatrist was able to point out what he meant by the terms "schizophrenic," "disoriented," and "masochistic," and to lift these terms from the abstractness of the written record to present reality.[97]

Likewise, a visit to a penal institution might enable the law student to relate more closely to the correctional ideals. The nice legal arguments as to the validity of the rehabilitation process are confined to the classroom. But to witness the rehabilitative process actually at work again represents the difference between abstraction and vivid reality. To have someone who understands the system translate what were only terms, objectives, and theories into a viable, operative system that the law student can observe firsthand is an invaluable experience in the law student's learning process.[98] Lawyers, particularly criminal practitioners,

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[95]Overholser v. Leach, 257 F.2d 667 (D.C. Cir. 1958); Carter v. United States, 252 F.2d 608 (D.C. Cir. 1956); Wells v. United States, 239 F.2d 931 (D.C. Cir. 1956).

[96]Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). The *Durham* test has since been discarded in the District of Columbia and replaced by the Model Penal Code formulation. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). Under *Durham* the test for criminal responsibility was whether the "unlawful act was the product of mental disease or mental defect," the term "disease" being used to indicate a condition capable of improvement or deterioration and the term "defect" referring to a condition not capable of change. 214 F.2d at 874-75.

[97]Watson, *Teaching Criminal Law, supra* note 15, at 715. This experience emphasizes that "true meanings are to be found by observing what man does with his terms, not by what he says about them. In this view the world is a product of the observer and the observed." ROCHE, *supra* note 23, at 245.

[98]The University of Georgia School of Law is engaged in two projects that offer students clinical experiences of this nature. The first is an internship program conducted at the Georgia Diagnostic and Classification Center, a new facility located in Jackson, Georgia, operated by the State Department of Offender Rehabilitation. The center is an intake facility through which every convicted person sentenced to a term in prison must pass for orientation, testing, interviewing, classification, and, ultmately, assignment to a particular institution. The law school's program accommodates three full-time student staff assistants and a resident staff attorney. The students interview inmates and screen not only cases in which legal relief appears meritorious but also cases in which social relief seems needed. For example, an inmate may be worried about his wife and how she will be maintained in his absence. A social counselor is available to assist in matters of this nature, and the students may refer the case to him.

The other program is an ambitious research project being conducted by the staff of the Georgia Law Review. The staff is engaged in an inquiry into the penal system in Georgia in an effort to determine if due process requirements are being accommodated within the system. Forming the basis for the study are empirical data gathered by the Law Review staff, who have actually traveled to various units in the penal system and interviewed inmates, administrators, and professionals in the corrections field. A part of their study seeks to determine whether implementation of

must deal with human problems in the social context of law. This experience will aid them in reaching decisions that are more closely attuned to reality.[99]

While these techniques indicate the value of the external function of psychiatry in criminal law, the real need—if the internal function is to be utilized—is for a psychiatrist to participate in the classroom teaching process. Many difficulties surface with collaborative teaching,[100] but if the internal psychological problems of the student are to be overcome, the presence of a psychiatrist in the classroom is desirable. Specifically, the student in criminal law experiences a resurgence of repressed drives that are shared with criminals and he identifies with fact situations in criminal cases, both of which combine to create emotional conflict within him.[101] Simultaneously he undergoes further inner conflict when confronted with the "narrowly technical legal dialectic"[102] of the case method and the psychological "put-down" of the Socratic method.[103]

A psychiatrist, if present during some class sessions, could help the class feel its way through anxiety-producing influences.[104] While most law professors utilize the techniques of verbal communication, ignoring for the most part the subtle human responses that are also present in the classroom, the psychiatrist might well detect the signs of student distress and anxiety to which the professor is insensitive.[105]

Thus bolstered, students could express their feelings and attitudes toward a problem without the usual psychologically deflating Socratic "put-down," developing through freer expression a greater insight into their own reactions to criminals and criminal behavior. Each student, upon sharing his thoughts with his classmates, would in all probability discover that many of them were reacting identically. He would begin to understand the workings of his own mind and to take into account and compensate for his own reactions. Students then would develop the skill

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due process requirements, with which they are familiar in the setting of the law school, is really accommodating inmate needs, with which they are coming into contact for the first time as an adjunct to their traditional approach to the study of law. For example, how is a judicially imposed requirement of representation by counsel in post-conviction proceedings to be evaluated against preliminary findings that indicate the vast majority of inmates do not want to be represented by counsel? The results of this study are tentatively scheduled for publication in Fall 1973.

[99]Watson, *Teaching Criminal Law*, *supra* note 15, at 716.

[100]George, *supra* note 13, at 469.

[101]Watson, *Teaching Criminal Law*, *supra* note 15, at 704-05.

[102]Ritchie, *Legal Education: The Past and the Future*, 32 TENN. L. REV. 386, 389 (1965).

[103]George, *supra* note 13, at 468.

[104]Watson, *Teaching Criminal Law*, *supra* note 15, at 714.

[105]Watson, *Psychological Aspects of Legal Education*, *supra* note 31, at 113-14.

of separating that part of the problem attributable to internal reaction from that part related externally to the problem at hand.[106]

Because students tend to identify themselves with the materials, they should be allowed to range more freely in class. As they do so, the psychiatrist could help them recognize and assess their emotional reactions to the criminal law materials. Utilization of this approach would be calculated to lessen anxiety felt toward the subject matter, while at the same time increasing the depth of human understanding and providing the basis for a more objective approach to criminal law to supplant the traditionally subjective treatment.[107]

The presence of a psychiatrist thus seems desirable, if not imperative, to relieve the problems encountered through exposure to criminal law materials. The anxiety-producing stress caused by present teaching methods perhaps does not require the presence of a psychiatrist in the classroom, although his assistance would be helpful in this respect also. In any event, because the psychiatrist has a special knowledge about human behavior, his criticisms and suggestions for improving current teaching methods are entitled to great respect.

To be sure, the case method and the Socratic method have many advantages,[108] but they also have been the subject of much criticism.[109] This is not to say that these methods are bad *per se,* but rather that they have been misapplied. Even the critics admit that, with modifications, the Socratic method is an excellent teaching technique.[110]

Modifications of both methods offer promising ways to relieve some of the anxiety symptoms manifested in the classroom. For example, instead of offering seminars and problem courses only in the third year, the first- and second-year courses could utilize these methods, reserving

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[106]George, *supra* note 13, at 471.

[107]Watson, *A Psychiatrist on the Law Faculty, supra* note 22, at 74.

[108]Frampton, *supra* note 5, at 1435:

> Compared with undergraduate education in American colleges . . ., there is advantage in the close analysis, tested in dialogue with teaching professors, of materials and issues circumscribed by the problems of a particular controversy. The mind that is shaped in this process usually has a keener edge and a truer point for discerning the central issue in a specific problem of control and communications in human relationships than one tooled in a "softer" educational atmosphere.

[109]While the case method "develops a high degree of analytical skill, it usually does not succeed in providing students with the skills needed to handle other aspects of the professional relationship, such as ethical concerns and the ability to deal with people." Watson, *Psychological Aspects of Legal Education, supra* note 31, at 117. The Socratic method has been subjected to a great deal of abuse and often has caused demoralization among law students. *Id.* at 114, 119-25.

[110]*Id.* at 145.

the close analysis of the case method for the third year.[111] The sequence of instruction is the reverse of what it ought to be:

> [T]he kind of deductive approach necessary for learning by means of the case method demands much more intellectual sophistication. Thus we see that in sequencing the educational process in law school, the highly questionable practice of putting the more difficult task first has been followed.[112]

Similarly, the use of the rigorous Socratic method should be withheld until the second and third years.[113] Even then, it should be modified in order to increase its value and effectiveness as a teaching tool. First, students should be given praise for good performance in class, to build the students' confidence and encourage them to apply themselves further.[114] Otherwise, the teacher is viewed as one who is demanding but reluctant to give anything in exchange.[115] Secondly, techniques can be developed for the actual alleviation of stress. This begins most directly with an acknowledgement by the teacher that the stress in fact exists.[116] This may seem unnecessary, but students—indeed, all humans—tend to believe they are alone in their stress and anxiety, and unless someone acknowledges the stress, they may never realize that it is a natural emotional response shared by all.[117]

A psychiatrist can be of great help in relieving anxiety symptoms in the classroom, whether they result from exposure to criminal law materials or from rigorous teaching methods. Recruitment of good psychiatrists to operate within a legal setting is difficult, but not impossible, and the intellectual rewards can be great. The law school affords an excellent intellectual forum in which a meaningful exchange of ideas can take place between the law students and the psychiatrist. This teaching technique is a two-way street, since within this context both the psychiatrist and the young lawyers are "students" in the sense that each is there to learn something from the other. This interaction in turn eases

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[111] *Id.* at 138.

[112] *Id.*

[113] *Id.* at 149.

[114] *Id.* at 145.

[115] *Id.* at 122.

> [T]he Socratic teacher, instead of being a giving person in the eyes of a student, tends to turn into an enemy who is feared and avoided if possible. . . . The class becomes less and less willing to expose itself and only the hearty few who become vigorous advocates will enter into the Socratic dialogue with any pleasure and enthusiasm.

Id. at 123.

[116] *Id.* at 146.

[117] *Id.* "They may borrow strength from each other in a positive way, giving courage to proceed into the very teeth of the difficulty."

some of the fears and suspicions about members of other disciplines and provides a relaxed atmosphere in which a free exchange can occur.[118]

V. Conclusion

This discussion, in the final analysis, has sought to focus on the individual, whether he be, in the internal context, the law student himself, or, in the external context, the criminal with whom the law student must deal. Traditionally, law was concerned with society, and only secondarily with the individual, while psychiatry focused almost exclusively on the individual.[119] But modern conditions may demand more of each: "The changing nature of our society and the demands made on both law and psychiatry require a re-examination of the role of both, and also of their relationship to one another."[120]

If law and psychiatry are to have any sort of relationship, the objective must be clarified:

> One hopes that this exchange of knowledge between psychiatry and law does not mean that a new breed of professional man is being developed who, like a zebra, will have streaks of law and psychiatry interlaced throughout his speech or embroidered on his outer garments. It does, however, mean that law, which expresses society's decisions as to the ordering of human relationships, and psychiatry, which seeks to prevent or heal mental illness, are becoming more closely interrelated through the growing knowledge and experience of members of both professions.[121]

The objective is not to create a new breed of professional. On the contrary, law and psychiatry should be able to work together, each borrowing from and contributing to the other. Specifically, psychiatry possesses a great amount of knowledge about human behavior that could be extremely useful in the study of law, particularly criminal law. The solution, which arises out of the original problem, is that from psychiatry we can learn "certain things that we need to know in order to form critical judgments."[122] The law student, if he is to cope with the psychological problems he faces and if he is to understand the underlying human problems in criminal law, must know "certain things" about himself and about others that law cannot tell him. Psychiatry can tell him both.

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[118]Watson, *Teaching Criminal Law*, *supra* note 15, at 714. *See* Shaffer, *Collaboration in Studying Law*, 25 J. Legal Ed. 239 (1973), which presents an interesting account of the kind of interchange that can occur between students and faculty, as a learning process for both.

[119]Guttmacher & Weihofen, *supra* note 40, at 4.

[120]J. Polier, *supra* note 15, at 12.

[121]*Id.* at 6.

[122]Currie, *supra* note 8, at 266.

MESNE PROCESS IN THE EARLY AMERICAN COLONIES

*Nathan Levy, Jr.**

Introduction

Attachment[1] and garnishment[2] in the United States today serve three legitimate purposes which, while interrelated, should not be confused with each other:

1. They may compel (induce) a defendant to appear in the cause and confer in personam judgment over himself.

2. They may enable the court to proceed quasi in rem[3] in the event no in personam jurisdiction is obtained over the defendant.

3. They may provide the plaintiff with a provisional security[4] that will survive even after in personam jurisdiction has been obtained over the defendant, thus aiding satisfaction of any in personam judgment that may be rendered against him.

In prior articles I have treated in considerable detail the development of attachment at common law[5] and of garnishment as practiced in

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[1]The word "attachment" will be used throughout this article to denote the levy upon assets of a defendant as *mesne* process, and in contradistinction to a levy of "execution" upon the assets of a judgment debtor as *final* process.

[2]The word "garnishment" will be used throughout this article to denote the *mesne* process by which assets of the defendant in a pending action are "bound in the hands of" the garnishee, as distinguished from a similar, but *final* process against a judgment debtor's assets – the latter process being more descriptively called "garnishment execution." Unfortunately, the single word, "garnishment," frequently is used in both senses, *e.g.*, Miss. Code Ann. § 11-35-9 (1972).

[3]The term "quasi in rem" will be used herein in the second, and more usual, of the two senses found in the *Restatement of Judgments*, that is, to denote a proceeding in which "the plaintiff does not assert that he has an interest in property [as he does in ejectment suits or in actions to quiet title], but asserts a claim against the defendant personally, and seeks to compel, to the satisfaction of his claim, the application of property of the defendant by attachment or garnishment." Restatement of Judgments § 32, comment *a* at 128-129 (1942).

[4]The "security" produced by attachment and garnishment is described as "provisional" because its ultimate existence is provisional upon the obtaining of judgment by the plaintiff. Being a creature of the legal action, its existence depends upon the existence of the action.

[5]Levy, *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 Yale L.J. 52, 58 (1968) [hereinafter cited as Levy, *Mesne Process*].

foreign attachment under the Custom of London.[6] Only the first two of the foregoing uses for attachment and garnishment are found in the practices so studied. Garnishment, as we are using the term,[7] was unknown to the common law courts (King's Bench, Common Pleas and The Exchequer), and attachment was used therein only to compel appearance by the defendant,[8] and not for quasi in rem jurisdiction. Garnishment existed in the mercantile courts, especially in the Lord Mayor's Court of London. It served not only to compel appearance of the defendant, but also as a basis of quasi in rem jurisdiction—as also did a species of foreign attachment called "sequestration" under the Custom of London.[9]

The third use of attachment and garnishment stated above, that is, a judicially created provisional security which is not dissolved by the defendant's appearance, did not exist either at common law[10] or under the Custom of London.[11] Such security seems to have originated in the American Colonies as judicial rather than statutory creations. We shall examine cases from early colonial years which support this conclusion, paying special attention to those which appear to be garnishments.

The problem of obtaining in personam jurisdiction over defendants who would not voluntarily appear vexed the common law courts in England for many centuries, and it was not until the year 1725 that the

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[6]Levy, *Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in the Light of the English Experience*, 5 CONN. L. REV. 399, 405 (1973) [hereinafter cited as Levy, *Attachment*].

[7]Garnishment is used in an entirely different sense in a common law procedure under the action of detinue for the redelivery of deeds which had been deposited with the defendant. The defendant who pleaded that the plaintiff and another had delivered the deed for redelivery upon certain conditions, and that the defendant did not know whether the conditions had been performed, prayed "garnishment" against the third party, who came in under a writ of *scire facias* to show whether the conditions had been performed. 3 J. REEVES, HISTORY OF ENGLISH LAW 598 (W. Finalson ed. 1880). There was also the practice of *scire facias* under the writ of *capias utlagatum*, by which debts owed to an outlaw could be confiscated by the Crown. For a discussion of the use of outlawry as a barbaric creditor's remedy, see Levy, *Mesne Process*, *supra* note 5, at 80.

[8]Levy, *Mesne Process*, *supra* note 5, at 60.

[9]Sequestration was the form of foreign attachment which lay against goods locked in a building where no person was therein. Levy, *Attachment*, *supra* note 6, at 418.

[10]Under the common law, if the defendant did not appear, the attached goods were forfeited to the King. 3 W. BLACKSTONE, COMMENTARIES *280. *See* Levy, *Mesne Process*, *supra* note 5, at 60, 96.

[11]The nonappearance of the defendant in foreign attachment under the Custom of London did not result in forfeiture to the King, but afforded the basis for quasi in rem jurisdiction. If the defendant did appear, the foreign attachment was dissolved. J. LOCKE, FOREIGN ATTACHMENT *49. *See* Levy, *Attachment*, *supra* note 6, at 411.

English got around to basing jurisdiction in personal actions on a mere summoning of the defendant.[12] We shall see that at least some of the American colonies took this step many years earlier.[13]

The Prevailing American Attitudes

The prevailing attitudes of American courts and writers is that garnishment is entirely a creature of statute[14] and is based upon the Custom of London.[15] The statutory and Custom of London foundations of present attitudes of garnishment should not be confused, however, since the two ideas are separate.

It is easy for a court to conclude that garnishment is not a common law remedy in a jurisdiction which refuses to consider a local custom to be common law no matter how ancient it may be, for it is true that there was no garnishment in the great superior courts of Common Pleas, King's Bench, and The Exchequer, which developed law "common to the realm" in England. This attitude toward what is considered "common law" may also explain why certain pre-statutory garnishment practices in the colonies were not picked up as part of an indigenous American common law,[16] though I shall offer an alternative explanation later.

American authorities have sometimes seized upon the real or supposed foundation of their own attachment statutes in the Custom of London, as the lever by which to put attachment outside the *sanctum sanctorum* of the common law.[17] It is true that cases in which the at-

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[12]Notes 64 & 65 *infra*.

[13]Notes 66 & 67 *infra*.

[14]*See, e.g.*, Grimmett v. Barnwell, 184 Ga. 461, 192 S.E. 191, 195 (1937). Mussman and Riesenfeld say: "It is hornbook law that garnishment proceedings today are entirely a matter of statutory law." Mussman & Riesenfeld, *Garnishment and Bankruptcy*, 27 Minn. L. Rev. 1, 7 (1942). *See* notes 15 & 17 *infra*.

[15]Ownbey v. Morgan, 250 U.S. 94, 104 (1921); Chicago, R.I. & Pac. R.R. v. Sturm, 174 U.S. 710, 714 (1899); Loewe v. Savings Bank of Danbury, 236 F. 444 (2d Cir. 1916); Beach v. Fairbanks, 52 Conn. 167, 172 (1884); C. Nadler, The Law of Creditor and Debtor Relations 74 n.11 (1956); 49 W. Va. L.Q. 171 n.15 (1943).

[16]R. Morris, Studies in the History of American Law 13 (2d ed. 1964).

[17]*E.g.*, Mills v. Findlay, 14 Ga. 230 (1853), wherein the court declined to allow attachment in an action for unliquidated damages for breach of covenant.

> By the custom of London, which is the foundation of all our Attachment Laws, an Attachment would lie upon contracts, either express or implied, for the payment of money; and to enforce which, an action of debt or *indebitatus*, assumpsit could be maintained. And our judgment is, that our Attachment Laws are thus restricted. Such has been the uniform construction given to them by the Courts, and acquiesced in by the profession. . . .
>
> The attachment is a proceeding unknown to the Common Law; and its provisions should be closely construed, as well as pursued; especially as against non-resident debtors, whose property may be sold, and the proceeds paid over upon an Attachment wrongfully sued out, before the absentee is apprised of the proceeding.

Id. at 232.

tachment is being used as a basis for quasi in rem jurisdiction bear a resemblance to the Custom. It is true, too, that some attachment and garnishment statutes obviously have borrowed from the Custom some of its features.[18] But all parallel with the Custom ends where the plaintiff is given provisional security in the attached property in actions wherein there is in personam jurisdiction over the defendant. Even the liberal Custom of London did not give the plaintiff such provisional security in this situation, for an appearance by the defendant dissolved the attachment.[19] Where the security in the attached property survives the defendant's appearance, the best argument that there was no attachment of the kind in question at common law, is not that the attachment resembles sequestration under the Custom, but that it affords a kind of provisional security unknown to the English common law.

Problems Encountered in Studying the Law in Colonial America

Anyone contemplating a study of any aspect of the law of the American colonies would do well to read the foreword to Professor Morris' *Studies in the History of American Law* (2d ed. 1964) and follow this with a perusal of the bibliographic materials found in the notes.[20] The basic difficulties of a study of colonial law are several. *First,* there is the "vast corpus"[21] of material, both published and unpublished. *Second,* there is the large proportion of the material which is unpublished and which can be examined only through resort to widely scattered original manuscripts.[22] *Third,* much of the published material has been collected and indexed by historians apparently untrained in law and consequently unaware of or disinterested in the kind of presentation of material that would be of the greatest value to lawyers interested in such subjects as this one. *Fourth,* the 20th century legal researcher encounters the risk of reading into 17th century materials his own attitudes rather than interpreting his findings in the light of the times. *Fifth,* some seemingly impartial and trustworthy materials may in fact be apologies and therefore suspect.[23] *Sixth,* it is quite difficult to ascertain accurately "the extent of the transplantation of the common law and of the application of English statutes to the colonies."[24] Professor Morris has written:

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[18]*See, e.g.,* notes 29 & 62 *infra.*

[19]Levy, *Attachment, supra* note 6, at 411.

[20]R. Morris, *supra* note 16.

[21]Morris examined 20,000 colonial cases in the course of an investigation of the law-in-action in the field of labor relations. *Id.* at vi.

[22]Morris has given us a splendid list and description of manuscripts and where they may be found. *Id.* at 267.

[23]*See, e.g., id.* at 14-15.

[24]*Id.* at 15.

> . . . . We need, and need desperately, a group of dedicated and trained minds who will be prepared to assume the task of editing our legal records, a task which summons those prepared to master the disciplines of law and history. Microfilm, Xeroxography, and other photocopying devices might well be utilized to supplement present programs for printing the unpublished court records of the colonial period. The great body of statutes still remains to be systematically reviewed and collated; the business of the courts, still awaits study and interpretation. We must do first things first. The voyages of discovery preceded the age of colonization. Before we can write the history of the law we must discover for ourselves what the law really was.[25]

In the light of the foregoing, let us embark upon a rather modest voyage whose purposes are to establish that, in some of the colonies, attachment and garnishment were pre-statutory in origin, that garnishment was not always based upon the Custom of London, and that there were other colonial practices in the field of process and provisional remedies that were indigenous to the colonies and, in some cases, antedated similar developments in England.

Attachment and Garnishment in the Colonies

Notwithstanding the great tide of authority to the effect that garnishment is entirely a creature of statute, there is evidence that garnishment had pre-statutory, *i.e.* judicial, origins in some American jurisdictions. The apparent scarcity of authority in this regard may be attributable, not to the lack of abundant practice in colonial times, but to a combination of inadequate court reporting and the destruction of records over the years. The reports usually available to lawyers, and the American Digest system shed little light upon the question.[26] A search therein has revealed but two cases which antedate the American Revolution, the earliest of which is dated 1728.[27] An examination of these and the other

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[25] *Id.* at xii-xiii.

[26] The following reports appear to be reasonably accessible to most courts (the date shown being the year in which such report begins): Kirby (Conn.), 1785; Boorstin (Del.), Ga., 1805; Harris & McHenry (Md.), 1658; Mass., 1804; Smith (N.H.), 1796; Coxe (N.J. Law), 1790; Coleman (N.Y.), 1794; Martin (N.C.), 1778; Dallas (Penn.), 1754; R.I., 1828; Bay (S.C.), 1783; and Va. Colonial Dec., 1728. For bibliographies of less common materials, *see* R. Morris, Early American Court Records: A Publication Program (Anglo-American Legal History Series, Ser. 1, No. 4, 1941); R. Morris, *supra* note 16. Jeffrey, *Early New England Court Records — A Bibliography of Published Materials*, 1 Am. J. Legal Hist. 119 (1957); Prager & Price, *A Bibliography on the History of the Courts of the Thirteen Original States, Maine, Ohio and Vermont*, 1 Am. J. Legal Hist. 336 (1957).

[27] Wells v. Cheslen, 1 Har. & McH. 91 (Md. 1737); Brooke v. Macnemara, 1 Har. & McH. 80 (Md. 1728).

pre-19th-century cases found therein reveals none prior to the enactment of garnishment statutes in their jurisdictions. Let us then search for the spoor in places not frequented by legal researchers. First, however, let us consider the opinions of several scholars who have concerned themselves with the subject.

Professor Beale states, "The custom of London became the custom of several colonies as part of their common law,"[28] but he cites no authority for this statement. In the same paragraph he probably commits an error in the other direction by saying, "in Pennsylvania, . . . the introduction of the custom was by statute . . . ;" for the Pennsylvania Act of May 10, 1699 implies the opposite conclusion. This statute purportedly removed doubts as to the legality of attachments, by validating "all writs or warrants of attachments heretofore granted . . . pursuant to any customs of cities or corporations in England, or according to any custom or usage in the said parts of America . . . ."[29]

Professor Morris states, "The foreign attachment procedure was transplanted to the American Colonies by legislation and court practice;"[30] and he refers to the Custom of London as "the fountainhead of borough justice in the colonies."[31] Morris cites no authority for the latter statement, and weakens the case for a counterpart of the New York practices in other parts of America by placing the origin of New York foreign attachments in Dutch rather than English antecedents. Morris' explanation of the possible role of the English practices is that "the survival of these [Dutch] practices was in large part owing to" the parallel with the Custom of London.[32] Nevertheless, Morris makes a good case for a pre-statutory practice in New York. He has unearthed a number of garnishment cases, the oldest of which is dated 1667, and the next oldest of which is 1682.[33] The other cases occurred during the years 1700-1709. By frequently reciting proceedings "according to the Usage and Custom of the said Citty," these cases of foreign attachment support the argument that their origin is to be found in local custom rather than in statute.[34]

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[28]Beale, *The Exercise of Jurisdiction In Rem to Compel Payment of a Debt*, 27 HARV. L. REV. 107, 112 (1913).

[29]The manuscript of the Act of May 10, 1699 is published in J. SERGEANT, A TREATISE UPON THE LAW OF PENNSYLVANIA RELATIVE TO THE PROCEEDINGS BY FOREIGN ATTACHMENT 278 (2d ed. 1840).

[30]R. MORRIS, SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784, at 19 (1935).

[31]*Id.* at 44.

[32]*Id.* at 43-44.

[33]*Id.* at 85-110.

[34]*Id.* at 88.

The excellent article of Professors Mussman and Riesenfeld[35] cites but two garnishment cases that possibly could be classified as pre-statutory. They refer to these cases as "Typical early instances of 'foreign attachments.' " The oldest case cited by Mussman and Riesenfeld,[36] a 1647 Maine case, seems definitely to be pre-statutory, and illustrates the typically brief and somewhat cryptic nature of the records.

> Capt. Francis Champernown cometh into this court and attacheth in the hands of Mr. John Treworgy all such somee or somes of money which are in his hands of Mr. William Paynes of Ipswich, to answer him in an action in the case at the next Generall Court. . . .[37]

There is an even older (1640) Maine case of garnishment:

> Plaints entered to by tryed at the next Court. . . . Thomas Jonson of Pascattaway, plaint. John Willcoks defend. An action of debt. An attachment granted forth at this Court directed to Nicholas Frost, Constable of Pascattaway to attach the defend. by 101 i [sic] now in the hands of Thomas Brookes and Peter Wyger of Pascattaway, due from them to the defend. to answeare the plaint. at the next Court to be holden here, in the aforesaid action.[38]

The other case cited by Mussman and Riesenfeld, a 1657 Maryland case,[39] will be treated below.

I have found a Maryland case which clearly is (1) a garnishment and (2) pre-statutory. It took place in the Provincial Court of Maryland on November 15, 1642.

> Eod. william howkins demandeth of william hardige six hundred & thirty pounds of tob [tobacco], due upon accompt: & 25 tob more for a hogshead.
>
> Attach in the hands of ffrancis Posie and Thomas Allen all such sommes of tob as they oweth to william hardige, so that they pay it not to the said william or to his use without further order from the Court, or william howkins, to whose use it is attached; viz to answere to the suit of the said william howkins at St maries on the list of decemb next in an action of debt of 655 1 tob. & to pforme judgment of Court therein. And forth. with warne the said william hardige that he assigne not to any other his interest in the said debts, without further

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[35]Mussman & Riesenfeld, *supra* note 14, at 1.

[36]*Id.* at 11 n.34.

[37]1 Province and Court Records of Maine 104 (1928).

[38]*Id.* at 48.

[39]10 Archives of Maryland 500 (1891). *See* text accompanying note 49 *infra* for the complete report of this case and for further analysis.

> order as aforesaid. And return this writt at or afore the said Court. To Sheriff S. maries.[40]

It should be noted that this actually is the garnishment of a debt in the intangible sense, not of a specific chattel, for tobacco was a medium of exchange in Maryland at the time of this case, as attested by this and many other cases during the early years of this colony. Consider, for example, the inventory of goods of John Bryants of April 29, 1638, wherein his various articles of personal property are valued in terms of pounds of tobacco, *e.g.*, "two suits & an old doublett valued at 030 1 tobacco."[41] Another example of the use of tobacco is to be found in the action of the Council of Maryland on February 9, 1637, commissioning Robt Philpott and others Conservators of the Peace with power to issue attachments against goods in certain "causes civill exceeding twelve hundred weight tobacco."[42]

The use of such items as corn and tobacco as media of exchange during the early years of some of the colonies was caused by the great scarcity of silver or gold money.[43] An interesting relic of this kind of economy is the former Georgia exception to the usual rule that only instruments payable in money may be negotiable. Georgia varied Section 1 of the Uniform Negotiable Instruments Act by adding: "Provided that a promissory note may be made payable in cotton or

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[40] 4 ARCHIVES OF MARYLAND 146 (1887).

[41] *Id.* at 30.

[42] 3 ARCHIVES OF MARYLAND 62 (1885).

[43] *See, e.g.*, text accompanying note 40 *supra*. The shortage of money was so acute in Connecticut that, on February 8, 1640, it was:

> Ordered, that whatsoeur debts shall be made within the libertyes of these Plantations, after the publishing of this Order, either by labour of men or cattle or contract for comodityes, yt shall be lawfull for the buyer or hier to pay it in marchantable Indean corne at three shillings fower pence the bushl.

COLONIAL RECORDS OF CONNECTICUT 1636-1665, at 61 (1850). On November 9, 1641, the General Court of Connecticut legislated as follows:

> Whereas by reson of the great scarcity of money, execution being taken of seuerall prsons goods, that haue bine sowld at the very cheap rats to the extreame damage of the debtor, it is therefore Ordered, that whatsoeuer execution shall be graunted vppon any debts made after the publisheing this Order, the Creditor shall make choyse of one prty, the debtor of a second, and the Court of a third, who shall pryse the goods so taken vppon execution as aforesaid and deliuer the[m] to the Creditor.

Id. at 69.

The Act of November 9, 1641, was incorporated verbatim in "Mr. Ludlow's Code" of 1850. *Id.* at 525. For the probable meaning of "pryse," *see* note 67 *infra*.

In the Massachusetts Bay Colony, the Courts of Assistants at Boston ordered, on October 18, 1631, "that corne shall pass for paymt of all debts at the vsuall rate it is solde for, except money or beavr be expressly named." 1 RECORDS OF MASSACHUSETTS BAY COLONY 92 (1853).

other articles of value."[44] A debt "in the sum of" so many pounds of tobacco or corn has a ring of tangibility about it that sounds like a reprise of the action of debt-detinue, and suggests the old controversy as to whether the ancient action of debt was real.[45]

On March 4, 1647, Maryland enacted "An act for the Extent of Attachments and Executions."[46]

> Whereas divers Inhabitants of this Province have been burdened and agrieved with Attachments . . . bee it enacted . . . that noe Attachment shall or may be layd upon any the Goods or Chattels of any inhabitant of this province except the true Owner thereof bee not att that tyme resident or dwelling in the province, and whoever shall attach more than a fourth part over and above the vallue of the debt shall beare the damages of the attachment and dammages of the party.

This act also contains the earliest American statute I have encountered which exempts part of a debtor's property from legal process. It was repealed on October 20, 1654,[47] but was re-enacted with a few changes on September 25, 1657.[48] The Maryland case cited by Mussman and Riesenfeld is dated May 14, 1657, and thus came in the 3-year hiatus when Maryland had no statute regulating attachment. On this basis it is possible to classify the case as non-statutory regardless of whether it is one of attachment rather than garnishment and regardless of whether the 1647 Act regulated both garnishment and attachment. The record of that case is as follows:

> Provincial Court of Maryland, May 14, 1657. Attachment is Granted unto Thomas Bellcher and Richd Smith upon the Estate of Richard True in the hands of Giles Glover to be responsible for a debt Claimed by them two thousand nine hundred of Tobacco and Caske which is allowed by the Court.[49]

We shall take up presently the question of whether this is a case of garnishment as distinguished from attachment. For the moment let us note that the thrust of this "attachment" is not that of compelling appearance, but that of being "responsible for a debt." In this emphasis we can observe a colonial court going far beyond the purpose of common

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[44] GA. CODE § 14-201 (1936), *repealed* by GA. CODE ANN. § 1094-10-103 (1962).

[45] *Compare* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 592 (2d ed. 1898), *with* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 386 (5th ed. 1956).

[46] 1 ARCHIVES OF MARYLAND 232 (1883).

[47] *Id.* at 351.

[48] *Id.* at 361.

[49] 10 ARCHIVES OF MARYLAND 500 (1891). The wording in my text varies somewhat from the version reported by Mussman & Riesenfeld, *supra* note 14, at 11n.34.

law attachment. Whether the case is one of quasi in rem jurisdiction or, instead, one merely of provisional security cannot be ascertained from the brief report available.

In 1669 the General Assembly of Maryland enacted a statute to remedy "the many mischiefs and inconveniences" which had resulted from attachments issued under the 1647 Act.[50] The new statute observed that there were "noe certain Rules presecribed for proceeding upon such Attachments . . . ," that such attachments had been "issued out upon very slender proof and security," and that the barring of defenses to the attachment by the running of a year and a day after same, had operated "to the great prejudice and almost utter Ruine of many of the good prople of this Province and Marchants Tradeing therein and thereunto." The statute then proceeded to regulate (in a manner described later) executions and "attachment against the goods and Chattles . . . which are or shall be in the possession of any person or persons for his use in this Prouince," and permitted such property to be "delivered [to the plaintiff] by way of Execucón" upon the giving of bond to make restitution to the defendant who should, within a year and a day, come in and make a "Just and due defence."

Does the foregoing statute of 1669 purport to regulate garnishment, that is, attachment "*in* the hands of" a third party; or does it regulate attachment in the narrow sense, that is, seizure of the defendant's property *from* the hands of the the third party? The 1657 case cited by Mussman and Riesenfeld as a garnishment case[51] suggests a similar question insofar as the "Estate" attached therein is tangible property. It is my opinion that both the 1669 statute and the 1657 case are instances of garnishment. The 1642 case set out above[52] is unmistakably a garnishment, being the "attachment" of an intangible debt, thus establishing definitely that garnishment was known to the Maryland courts. If the "debt" branch of garnishment was indulged in by the courts, why not the "detinue" branch?[53] The plaintiff's execution-bond provision and the "year and a day" provisions of the 1669 statute strongly suggest the influence of foreign attachment under the Custom of London,[54] with its own emphasis upon garnishment instead of the

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[50]2 ARCHIVES OF MARYLAND 206 (1884).

[51]10 ARCHIVES OF MARYLAND 500 (1891).

[52]4 ARCHIVES OF MARYLAND 146 (1887).

[53]Foreign attachment under the Custom of London reached not only debts in the ordinary sense, but also tangibles which at common law would be the subject of an action of detinue for their recovery. *See* Levy, *Attachment, supra* note 6, at 409.

[54]In order for the plaintiff in foreign attachment under the Custom of London to have execution against the garnishee he was required to find sureties to undertake

seldom-seen "sequestration." The same provision is encountered over two centuries later in another Maryland garnishment in *Harris v. Balk*.[55] Finally, the phrase "in the hands of" already had a long and close association with garnishment and, under the Custom, negatived any process of sequestration. On the basis of the foregoing, I suggest that there is at least one garnishment statute older than the 1683 Maryland Act cited by Mussman and Riesenfeld as "the oldest garnishment statute in America known to the writers."[56]

Does "Attachment" under the 1647 Act include "garnishment?" Although it is more doubtful than was the case under the 1669 statute, there is some evidence to the affirmative. We know that there were garnishments in the courts, and we know the courts and statutes tended to use the word "attach" in the double sense suggested. Furthermore, if I am correct in my belief that the 1669 statute governed garnishment, this latter statute, by its expressed purpose of improving procedures under the 1647 Act, seems to imply that the earlier Act also covered garnishment.

The 1669 Maryland statute is interesting for other reasons. It required that persons departing the province "appoint a resident attorney for all actions to be brought against them in their absence;" and it provided for the summoning of departed persons who had not appointed attorneys, by sending a copy of the writ and declaration to "the Sheriffe of the County where the party soe prosecuted did dwell and Reside who is hereby Enjoyned to leaue a Coppy of such writt or Sumons as alsoe a Coppy of the Declaracon or cause of action" presumably (although not expressly stated) for the defendant at his dwelling. The statute also restricted the classes of defendants amenable to attachment by providing that "noe Attachment shall be layd upon any the goods or Chattles of any Inhabitant within this Prouince Except he or They be not att that tyme Resident or dwelling within the Prouince or have not left any Attorney in his place vpon Record as aforesaid." The statute, which regulated executions as well as attachments, further purported to protect debtors by prohibiting levies in excess of the debt and costs and by prohibiting levies which would "deprive them of all Livelihood for the future but that Corne for necessary maintenance Bedding gunn ax pott & necessary Labourers

that, if the defendant should within a year and a day appear and disprove or avoid the alleged debt, the plaintiff (or the sureties) would restore to the defendant the debt condemned in the hands of the garnishee. Levy, *Attachment*, *supra* note 6, at 414.

[55]198 U.S. 212 (1905). For a detailed analysis of *Harris*, *see* Levy, *Attachment*, *supra* note 6, at 427-429, 438, 441-449.

[56]Mussman & Riesenfeld, *supra* note 14, at 11.

Tooles with such like household Implements and Ammunicon for substance shall be protected from all such Attachments And Execucons soe long as he or they shall Inhabite within this Prouince." None of the benefits of the statute were available to defendants who "shall wilfully absent themselves into the woods" to escape process, or shall "intend to depart or fly out of the Prouince."[57]

The following record appears of a case in the General Court of Connecticut, August 1, 1639:

> Jno Moody had an attachment granted vppon the g[oods of Thomas] Gaines in the hands of Mr. Stoughton, for a debt [of 5lb weight of Tobacco.][58]

(The brackets [ ] are found in the 1850 publication of the old manuscripts.) I believe this to be a true garnishment case, and one which antedates by 8 years the first Connecticut statute on the subject of "attachment" in any form.[59] If I am correct in my classification of this case, it is, I believe, the oldest garnishment action yet found in America.

By 1692, in Western Massachusetts, we find John Pynchon, Magistrate in Springfield, issuing what appears to be a garnishment:

> Sept. 12th 1692 [Pynchon Court] Thomas Day of Springfield Plaintiff against Richard Burk late of Springfield Defendant according to Atachment for not paying a debt of about fifteene shillings due by Bil with all due damages. Richard Burk being .3. times called and not appearing I proceeded according to Atachment, the Goods Atached being in the hands of Thomas Mirick Senior, Tilly Mirick and James Warrinar. . . . I find for the plaintiff . . . I deferred execution the defendant being absent for one weeke.[60]

Further support for the proposition that goods attached "in the hands of" a third party were not seized in the manner of a true attachment, but were treated as goods subject to garnishment, is found in another case in the Pynchon Court, dated May 14, 1694, in which Joseph Wiliston sued Thomas Taylor:

> Thomas Taylor being .3. times caled, The Attachment was returned and Read: Returne being that it was served on a Red Cow of Thomas Taylors now in the hands of Nathanel Hermon of Suffeild, who owned that the Cow was Thomas Taylors:

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[57] 2 ARCHIVES OF MARYLAND 207, 208 (1884).

[58] COLONIAL RECORDS OF CONNECTICUT, *supra* note 43, at 29.

[59] *Id.* at 151.

[60] J. SMITH, COLONIAL JUSTICE IN WESTERN MASSACHUSETTS (1639-1702), at 329 (1961).

> which the Sheriffs deputy Left under Nathanel Harmons care till the Tryal: returne also being that Sumons in writing for said Taylors appearance now, was left at . . . the Last abiding place of said Taylor and notice given of what was Attached. . . ."[61]

This was some 16 years prior to what Mussman and Riesenfeld considered as "the original statutory regulation of trustee process [the Massachusetts name for garnishment]," the Act of 1708.[62]

The colonial records are full of attachment cases, and what has been said about garnishment statutes and cases in the colonies generally applies to attachment, for the colonists treated both procedures as one.[63] No doubt, the first statutes were more regulatory than initiatory of court practices.

Jurisdiction Based Upon Summons; Abode Process

I have written elsewhere of the 16th and 17th century demise of the common law mode of attachment, as arrest became the usual method of securing the appearance of the defendant in the English superior courts; and I have noted the reactions thereto which culminated in the establishment of jurisdiction based upon mere summoning of the defendant.[64] Although it was not until The Frivolous Arrest Act of 1725 that we find unmistakable English authority for jurisdiction based on personal service of process (and even that authority preserved at least the *form* of arrest),[65] there was, in 1644, a statute of Plymouth Colony authorizing the institution of suit by summons "as authenticall as if it were donn by warrant to attach or arrest them."[66] Jurisdiction based on service of

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[61] *Id.* at 338.

[62] Mussman & Riesenfeld, *supra* note 14, at 17; 1 Acts and Resolves of the Province of Massachusetts Bay 629 (1874). It should be noted that, in seating his court in Springfield, Pynchon was operating out of territory that had been considered to be part of Massachusetts since 1643; whereas, in sending process into Suffield, he was invading territory claimed by Connecticut and which is part of Connecticut today. A. Van Dusen, Connecticut 43, 93 (1961).

[63] "Attachment was almost the regular mode to begin a civil action." Mussman & Riesenfeld, *supra* note 14, at 11.

[64] Levy, *Mesne Process*, *supra* note 5, at 61.

[65] Frivolous Arrest Act of 1725, 12 Geo. 1, c. 29; extended and amended by the following statutes: 5 Geo. 2, c. 27 (1732); 21 Geo. 2, c. 3 (1748); 19 Geo. 3, c. 70 (1779); 43 Geo. 3, c. 46 (1803); 51 Geo. 3, c. 124 (1811); 57 Geo. 3, c. 101 (1817); 7 & 8 Geo. 4, c. 71 (1827). *See* Levy, *Mesne Process*, *supra* note 5, at 69.

[66] Act of June 5, 1644, Plymouth Colony:

> that it shalbe lawfull for the Gounor and Majestrats or any of them to direct a summons to any pson within the Goument to answere to any suits commenced against them. and it shalbe as authenticall as if it were donn by warrant to attach or arrest them.

Records of Plymouth Colony Laws 1623-1682, at 43.

summons is found in a May 25, 1647 Connecticut statute,[67] but the nature of the proceedings, whether in personam or quasi in rem, is not clear. In thus elevating the common summons to such jurisdictional efficacy, the colonies seem once again to have preceded the mother country.

The elimination of necessity for process literally directing the physical seizure of the defendant is consistent with the pragmatic approach of these new and precarious societies. The colonial courts were concerned with developing effective procedures[68] which would interfere as little as possible with the necessary functions of the colonies. These new and

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[67]COLONIAL RECORDS OF CONNECTICUT, *supra* note 43, at 151. The preamble recites the practice of debtors defrauding their creditors through the means of "secret contracts of their lands . . .," and authorizes any creditor who suspects his debtor to be insolvent in his personal estate, to enter a caveat with the Recorder of the Plantation against his lands, and to

> take out sumons against the said debtor . . . [and at the next court to] declare against the said debttors lands, lotts & accomodations; . . . enter a judgment vppon the said lotts, lands and accomodations, and take out an extent against the said land, directed to a knowne officer, who maye take two honest & sufficient men of the neighbours, to appryse the said lands . . . either to be sould out right if the debt so require, or sett a resonable rent vppon the same, vntill the debts be payd, and deliuer the possession thereof . . . to the creditor . . . ; pruided that if the said debttor can then presently prcure a Chapman or Tenant, that can giue to the creditor or creditors satisfactio to his or their content, he shall haue the first refusall thereof. . . .

Id.

Under the statute, caveats filed by competing creditors were paid seriatim in the case of solvent estates and pro rata in cases of insolvency. It then provided that "this is not to seclude any creditor to recouer other satisfaction, either vppon the prson or estate of the sayd debtor, according to lawe and custum of the Collony." The word "appryse" probably does not mean "appraise," but seemingly follows the Scotch use of the word. "Apprysal" means, "A form of process by which a creditor formerly took possession of the estates of the debtor in payment of the debt due." BLACK'S LAW DICTIONARY 130 (4th ed. 1951). The word "pryse," *supra* note 43, seems to be a corrupted spelling of "appryse," matching the similar corruptions of many other words therein.

[68]An interesting reason for the establishment of effective debt collection procedures is the inducement of extension of credit in the first place. A Maryland colonial court's understanding of this is illustrated by the following:

> Wherefore, if creditors here should not be permitted to derive any security or benefit from our local laws, the credit of British merchants here would generally cease. Hitherto the property of a British merchant here, has been and is understood to be a *depositum*, or peculiar security for the payment of country creditors; to the extent, therefore, of such property, credit is given here without inquiry into the circumstances of the merchant elsewhere, and that Britain does not derive very considerable commercial advantages from this confidence, can hardly be thought.

Burk v. McLain, 1 Har. & McH. 236 (Md. 1766) (dictum). The Maryland court declined to permit an English creditor to attach his debtor's property in Maryland because the creditor was in England where the debtor was in bankruptcy and where the creditor could easily participate in the debtor's estate.

precarious societies could ill afford to be deprived of their able-bodied men through arrest or through outlawry. The possession of legislative power by colonial courts[69] made it easier for them to meet such needs through just such innovations as basing jurisdiction on no more than service of a summons upon the defendant.

The elimination of the necessity for process literally directing the physical seizure of the defendant paved the way for another important development which seems to have come first on this side of the Atlantic. Whereas substituted service in personal actions appears in English statute in 1811,[70] abode service was found in America at least by the late 17th century.[71]

Conclusion

The rustic colonies were a far cry from 17th century England, the land of shopkeepers. Pioneer physical conditions in the colonies, the great uncharted expenses of territory, and the uncertainty of the life and continued presence of one's debtor, created a need for more efficient processes than existed in England in the common law courts of that time.[72] In England the need for more effective debt-collection processes was met by the mercantile courts, thus affording a sort of relief valve which prevented the build-up of pressures which might have forced changes earlier in the superior courts. But in each of the early colonies there was but *one* system of courts, and that system had to administer *all* the law required for the daily needs of the people. It was only natural,

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[69] *See, e.g.*, text accompanying notes 58 & 59 *supra*. The Fundamental Orders of Connecticut § 10 (1639) confer both legislative and judicial power upon the General Courts:

> . . . . In which said Generall Courts shall consist the supreme power of the Comonwelth, and they only shall haue power to make laws or repeale them, to graunt leuyes, to admitt of Freemen, dispose of lands vndisposed of, to seuerall Townes or persons, and also shall haue power to call ether Courte or Magestrate or any other person whatsoeuer into question for any misdemeanor, and may for just causes displace or deale otherwise according to the nature of the offence; and also may deale in any other matter that concerns the goods of this comon welth, excepte election of Magestrats, which shall be done by the whole boddy of Freemen.

Colonial Records of Connecticut, *supra* note 43, at 25.

[70] Stat. 51 Geo. 3, c. 124 (1811), extended to Nov. 1, 1823 and thence to the end of the next session of Parliament by Stat. 57 Geo. 3, c. 101 (1817).

[71] *E.g.*, 2 Archives of Maryland 207, 208 (1884); J. Smith, *supra* note 60, at 338.

[72] In the seventeenth century American law was born. It grew amid the surroundings of the first American frontier which nurtured self-assertion and independence. By its very isolation from established centers of culture, the frontier created of necessity a culture peculiarly its own.

R. Morris, *supra* note 16, at 17.

then, for the colonial courts to meet the challenge of the times and go beyond the confines of the common law.

But the colonists' minds were not tabulae rasae. An English legal heritage, developed over the centuries, was the matrix within which they formed their own laws. No doubt, the matrix sometimes was distorted, sometimes to its advantage, by relatively unschooled courts. Morris has noted that,

> The fundamental limitation on the growth of American law in the seventeenth century was the scarcity of lawyers. Yet the absence of the professional class was to a considerable degree accountable for the liberation of American law from many of the shackles of English medievalism.[73]

The differences in sophistication among the colonial courts are quite apparent and, in part, account for the variations in practices found in different places and times.[74] There were other sources of differences among the colonies, such as the varying religious beliefs and attitudes toward their place in law,[75] and differing attitudes toward the role and authority of English law (common and statutory) in colonial legal systems.[76] One thing stands out, however, and that is that the colonists were thoroughly aware of the power they had and of the necessity of molding their laws to suit their own circumstances.

We have seen examples of the use of attachment and garnishment in American colonies for all three purposes: (1) to compel (induce) appearance of the defendant,[77] (2) as the basis for quasi in rem jurisdiction,[78] and (3) for provisional security which survives the appearance

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[73] *Id.* at 41-42.

[74] As conditions on the first frontier of the Seaboard became stabilized, the conservative interest in static security thwarted further independent development. In the western movement of the American population new frontiers were established which fashioned the political and social institutions of the old along characteristically independent lines adapted to their conditions. From the new frontiers emanated new social currents which reacted on the older settlements. This frontier process . . . brought about in the field of law the scrapping of what Professor Paxson has termed "Englishism."

Id. at 17.

[75] *Id.* at 21.

[76] *Id.* at 41.

[77] *E.g.*, "The Particuler Courte May The 7th, 1640, Colony of Connecticut:"

> At the request of Mr. Phelps, in the behalfe of Mr. Rocester, an attachment is graunted for the Constable of Wyndsor to distreyne & take into his custody 20 bush. of Corne, of James Nortons of Quinipwucke, and that to keepe vntill the said James shall appeare at the Court at Hartford and there answere what shall be laid to his chardge.

COLONIAL RECORDS OF CONNECTICUT, *supra* note 43, at 49.

[78] The Maryland statute of 1669, 2 ARCHIVES OF MARYLAND 206 (1884), text accompanying note 50 *supra*, clearly implies that, prior to its enactment, quasi in rem jurisdiction had been exercised by Maryland courts. Quasi in rem jurisdiction began

of the defendant.[79] The summons was used quite early in our history, nearly a century prior to the same use in England, as the basis for jurisdiction in personal actions.[80]

In contrast with the considerable evidence of the right of creditors to resort to the attached property of their non-appearing debtors and their right to provisional security, is the lack of evidence that attached property ever was forfeited to the government or to the Crown. This is not surprising when one considers the vast differences that existed between England and America. The first twelve English colonies on the continent were settled by private enterprise rather than by expeditions financed by the Crown.[81] The early 17th century was the age of such monuments to self-government and individual rights as the Virginia Assembly (1619), Mayflower Compact (1620), The Fundamental Orders of Connecticut (1639), the Massachusetts Body of Liberties (1641) and the New England Confederation (1643). Over twenty thousand Puritans emigrated to New England during the 1630's,[82] and they "had a definite mission—to establish a community rather than a mere colony, where they could put their ideals into practice."[83] Morison says that the Mayflower Compact, "like the Virginia assembly, is an almost startling revelation of the capacity of Englishmen in that era for self-government."[84] The same author tells us that

> The transfer of the Massachusetts Bay charter from London to Boston had an important influence on future American institutions. It made the colony virtually independent of England. There was no royal governor or judge, no English army garrison, no parliamentary agent; nothing to keep it in line with English colonial policy. And the form that this colonial government took, following the terms of the charter, became the standard American pattern. . . . The free men were now the voters, the governor and deputy governor the two chief magistrates, and

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in Virginia as early as 1658. 1 Henning, Statutes at Large 466 (1823). *Cf.* The Connecticut Act of 1647, Colonial Records of Connecticut, *supra* note 43, at 151 & n.67.

[79]*See* The Connecticut Act of 1647, Colonial Records of Connecticut 1636-1665, at 151 & note 67 *supra*. *See also* Charters and General Laws of the Colony and Province of Massachusetts Bay 49 (1814) for a 1671 statute providing for such provisional security. *See* the Nov. 15, 1642 case, 4 Archives of Maryland 146 (1887), text accompanying note 40 *supra*, a pre-statutory case in which the function of attachment is not only to compel answer by the defendant, but also to effect satisfaction of judgment.

[80]Note 66 *supra*.

[81]S. Morison, The Oxford History of the American People 48 (1965).

[82]7 W. Durant, The Story of Civilization 204 (1961).

[83]S. Morison, *supra* note 81, at 65.

[84]*Id.* at 55.

the assistants doubled as governor's council and supreme court.[85]

The belief that garnishment statutes are based on the Custom of London is, with few exceptions, not well supported by the evidence. In fact, there is much evidence to the contrary. Most of the early colonial cases and statutes are almost wholly lacking in the formality and intricacy attained by that time by the procedure in the Mayor's Court of London. The colonial attachments and garnishments simply reached out and drew in the assets of the debtor without any pretext of preliminaries. In at least half of the colonies, these practices were initiated *without the aid of statutes.* Perhaps the early colonial courts which issued such process showed such temerity in part because, in the absence of today's separation of powers of government (the early courts possessed both legislative and judicial powers), they had no great fear of charges of usurpation when expanding their operations into new areas. In spite of the lack of clear separation of powers, however, the colonial records clearly permit the distinguishment of judicial from legislative actions of the same court.[86]

What we have called "attachment" is called only "sequestration" under the Custom of London; yet, I have not encountered the term "sequestration" in the colonial records of attachment and garnishment. Garnishment is treated as a natural, and seemingly unquestioned, aspect of attachment, and is subsumed under the same term, "attachment;" the garnishment cases being distinguished by their use of the phrase "in the hands of," to designate the garnishee. Unlike the Custom of London throughout its entire history, some of the colonies rather early began to grant provisional security in the attached property to the plaintiff,[87] which survived the defendant's appearance. Like the Custom, however, some granted garnishment and exercised quasi in rem jurisdiction almost from the beginning.

What caused later American courts to shackle themselves with the doctrine that they lacked inherent power to issue writs of attachment and garnishment? I suggest that a large factor was the loss of knowledge of the colonial practices and the real significance of the early statutes. The pioneer settlers had died off. The accretion of patchwork-quilt legislation that merely regulated court-originated practices seemed, a century and more later, to be the beginning point of garnishment and of provisional security and of quasi in rem jurisdiction. Professor Morris says:

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[85] *Id.* at 66.

[86] *E.g.*, note 69 *supra.*

[87] 2 ARCHIVES OF MARYLAND 206 (1884).

> The neglect of the general field of American colonial law is not assignable alone to the conservatism of the bench. Other factors have played a part. In the first place, great difficulties have confronted the historian and the lawyer in search of evidence. Primary obstacles have been the absence of reports and legislative records.[88]

Attachment, being treated in the same statutes and being merely another side of the same coin, suffered the same fate. These statutes were not nearly so revolutionary to the colonists who enacted them. The publication of the old manuscript records of the colonies did not begin until well into the 19th century,[89] but by then the American judicial mind was pretty well made up. The regulatory nature of the early statutes has been recognized occasionally,[90] and there have been departures from strict constructions of attachment and garnishment statutes,[91] but the "in derogation of common law" argument has often prevailed to defeat the attachment or garnishment;[92] and destruction of the attachment or garnishment often means the defeat of the creditor's only practical means of legitimate collection of his debt.

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[88] *See* R. MORRIS, *supra* note 16, at 13.

[89] *Id.* at 259.

[90] Mussman & Riesenfeld, *supra* note 14, at 11.

[91] Loewe v. Savings Bank of Danbury, 236 F. 444 (2d Cir. 1916) and cases cited therein; Dorr-Oliver, Inc. v. Willett Associates, 153 Conn. 588, 219 A.2d 718 (1966); Marsh v. Moore, 52 R.I. 458, 161 A. 227 (1932).

[92] Compare the following cases: In Blakely v. Bradford, 1 Bay 361 (S.C. 1794), an attachment against goods and wares of a defendant who had gone to another state to hire workers was dismissed because the statute provided for attachments only against "those who were in the act of removing, or who concealed themselves; and did not extend to those who had notoriously left the state previous to the issuing of the attachment. . . ." *Id.* at 362. The purpose of the statute was to give the plaintiff speedy relief in the circumstances covered, and is "a deviation from the common law . . .," and to be strictly construed. *Id.* In Fulwider v. Benda, 62 S.D. 400, 253 N.W. 154 (1934), the statute provided for attachment in cases where debtors were about to remove any of their property with intent to defraud or delay their creditors. On motion to dissolve the attachment, the evidence showed that the debtor intended to dispose of part of his property, pay part of his debt, and move, along with the rest of his property, to another state where he intended to begin farming. The defendant denied that he intended to delay or defraud his creditors. The Supreme Court of South Dakota reversed an order dismissing the attachment, holding that the above described conduct was sufficient to establish as a matter of law the dilatory intent, and perhaps the fraudulent intent, contemplated by the statute. The creditor was not compelled to stand by and see his debtor become a nonresident and remove all his property from the state, with no power to attach merely because the debtor continually reassured him of his good intentions.

> . . . . [When the creditor] fairly brings himself, by his application, within the spirit and intent of the statute authorizing this remedial and provisional remedy, he is to be protected in the enjoyment of its advantages.

Id. at 405, 253 N.W. at 156.

Even the English courts sometimes extended the applicability of statutes in derogation of the common law beyond the narrow confines of their literal language. For example, in the 1550 case of *Platt v. The Sheriffs of London*,[93] the Barons of the Exchequer held that a statute[94] permitting the action of debt to be maintained against the Warden of the Fleet for the escape of a prisoner taken on execution of judgment, could be "extended by equity" to permit recovery for such an escape from the custody of the Gaolers of Ludgate, notwithstanding the argument that the statute was penal in nature and permitted an action not maintainable at common law.

> . . . But although the action should not be maintainable by the common law, and although the statute was not made in affirmance of the common law, but was a new ordinance, yet the bill shall be maintainable by equity of the statute of Rich. 2. notwithstanding the statute does not give the action by express words against any other than the warden of the Fleet, for although it is penal against the warden, yet it is beneficial to all others, and therefore shall be extended by equity, for every statute is penal to some body. But inasmuch as the taking it by equity shall be more beneficial than prejudicial to the greater number of men, this is the reason why it may be extended by equity by the rules of law.[95]

I suggest that the *remedial* aspect of mesne processes and provisional security is much more important, and historically more realistic, than the fact that these remedies sometimes "derogate" common law in the narrow sense of ancient English superior-court-made law.[96] As has been demonstrated above, the newer remedies afforded more direct, more efficient and less oppressive processes than the common law processes of

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[93]75 Eng. Rep. 57 (Ex. 1550).

[94]Stat. 1 Rich. 2, c. 12 (1377).

[95]75 Eng. Rep. at 59.

[96]Glenn agrees, as shown by the following statement which seems to suggest that the Custom of London could have been considered as common law of the colonies.

> . . . . The other old States [in addition to New York, Pennsylvania and Massachusetts] also acquired the process through colonial enactments. Thus attachment came to us through statute and not the Custom of London; and so to this day a court will exhibit, occasionally, a tendency to construe attachment statutes strictly, as "in derogation of the common law." Of course this is erroneous. Statutes that aid a creditor to realize his debt from the debtor's property that is not exempt should receive a liberal interpretation; and this idea should apply, not only to process after final judgment, but also to a provisional remedy like attachment.

1 G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 38 (Rev. ed. 1940). Glenn also said:

> . . . . Then the process [of attachment of tangibles and of credits at the outset of a suit] floated into the common law world by means of that estuary of the law merchant that was called the custom of London. . . .

Id. § 37.

arrest and outlawry. By the time the courts had expanded the civil uses of arrest and outlawry as common law remedies, their civil objectives were not appreciably different from those of the newer ones created by statutes on both sides of the Atlantic and by many courts on this side. These newer and more civilized remedies should not be described by such a pejorative term as "derogatory."

I suppose it is too late to expect American courts to develop an American Common Law on the subject of mesne process and provisional security, such as was begun for them in some of the colonies. It is not, however, too late for courts to interpret and construe existing statutes more realistically instead of being slaves to old dogma.

COMMENTS

MISSISSIPPI EMINENT DOMAIN LAW

> There stands the poor man's cottage; the rains of summer and the snows of winter may enter its crevices; but the King of England with all his forces dare not enter that poor man's cottage.*

Introduction

Property acquisition at all levels of government—federal, state, and local—has increased, as the activity of each level has increased.[1] In light of the increased activity in the area of property acquisition by these levels of governments, an exploration and evaluation of the Mississippi eminent domain law should prove to be valuable. To accomplish such an exploration and evaluation this writing has been given a tripartite nature encompassing the following:

1. a statement of the fundamental principles underlying the right of eminent domain;

2. an examination of Mississippi's eminent domain procedure; and

3. a comparison of the Mississippi procedure with the procedures of other states.[2]

Since eminent domain litigation, more often than not, revolves around procedural questions,[3] and since the Mississippi eminent domain procedure statutes have recently been streamlined,[4] this writing shall emphasize procedural problems.[5] Due to the interrelation of sub-

*Dickinson, *Leading Limitations upon the Exercise of the Right of Eminent Domain,* 1 Corn. L.J. 1, 53 (1894), *citing* an unknown English statesman.

[1]Bryant, *Eminent Domain—Its Use and Misuse,* 39 U. Cin. L. Rev. 259, 265 (1970).

[2]While case law is an invaluable source of information, any decisions cited as authority for other jurisdictions should be viewed with suspicion, since the eminent domain statutes and practices of various jurisdictions are so diverse, they make any court decisions of one jurisdiction of questionable value as a precedent in any other jurisdiction.

[3]1 J. Sackman & R. Van Brunt, Nichols' The Law of Eminent Domain § 4.10, at 458-59 (3d ed. rev. 1964).

[4]Effective January 1, 1972, Miss. Code Ann. § 2749-01 through -26 (Supp. 1972) replaced the prior eminent domain statutes which were repealed by ch. 520, § 26, [1971] Miss. Gen. Laws.

[5]Federal eminent domain procedures are not within the scope of this writing, since they are now separate from the state procedures.

Rule 71A of the Federal Rules of Civil Procedure, which became effective on August 1, 1951, revolutionized condemnation practice in the federal courts by

stance and procedure, the two cannot be totally separated, therefore, substantive issues will creep into the discussion from time to time.

To test your ability to perceive the present status of the ultimate issue in the field of eminent domain law ask yourself the following question as you read: is compensation paid for the property owner's loss *(i.e.,* the taking of the land), or is compensation paid for the public's gain *(i.e.,* the land taken)?[6]

I. General Principles of Eminent Domain Law

A. The Source of Eminent Domain Power

Before the existence of the states, the United States, or any of the associated state and federal constitutions, the inhabitants of this land were vested with all of the existing sovereign powers.[7] Those inhabitants, through use of the state and federal governmental structures, have since that time vested that sovereignty in the various legislative bodies.[8] One inherent right of that sovereignty is the power of eminent domain,[9] and since the federal government and each of the state governments are considered to be individual sovereigns, each is cloaked with the power of eminent domain.[10] Any conflict which may arise between a state and the federal government regarding their powers of eminent domain is to be resolved in favor of the federal power,[11] and the federal

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abolishing the requirement of conformity to state practices and procedures . . . substituting a uniform procedure in all cases except where Congress has established a special tribunal for the determination of the issue of just compensation.

Miller, *Federal and State Condemnation Proceedings—Procedure and Statutory Background,* 14 Vand. L. Rev. 1085, 1091 (1961).

[6]*See* Comment, *Components of Eminent Domain: An Ancient Tool for Contemporary Use,* 15 S.C.L. Rev. 943, 964 (1963).

[7]C., *The Right of Eminent Domain,* 5 U. Pa. L. Rev. 2 (1856).

[8]*Id.*

[9]Boom Co. v. Patterson, 98 U.S. 403, 406 (1878); West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 532 (1847); Cooper v. Magic City Trucking Serv., Inc., 264 So. 2d 146, 150 (Ala. 1972); City of Little Rock v. Raines, 241 Ark. 1071, 411 S.W. 2d 486, 490 (1967); City of Miami Beach v. Cummings, 266 So. 2d 122, 124 (Fla. 1972); Kennebec Water Dist. v. City of Waterville, 96 Me. 234, 52 A. 774, 778 (1902); Turner v. Town of Gardner, 216 Mass. 65, 103 N.E. 54, 57 (1913); Orr v. Quimby, 54 N.H. 590, 592 (1874).

[10]Cooper v. Magic City Trucking Serv., Inc., 264 So. 2d 146, 150 (Ala. 1972); Inspiration Consol. Copper Co. v. New Keystone Copper Co., 16 Ariz. 257, 144 P. 277, 278 (1914); Chicago, B. & Q. R.R. v. Cavanagh, 278 Ill. 609, 116 N.E. 128, 130 (1917).

[11]McKean, *Constitutional Limitations Upon the Power of Eminent Domain,* 6 Rocky Mt. L. Rev. 16, 17 (1933).

government is not required to obtain a state's consent to exercise federal eminent domain power in that state.[12]

The state or its political subdivisions have several means by which they may infringe upon the private property of the people.[13] Although eminent domain is similar in fashion to other state powers in that it allows the public interest in public improvements to outweigh the lesser individual private interests,[14] it is clearly a distinct and separate state power.[15] The power of eminent domain is not easily defined, but can be better viewed if broken down into its three components: (1) the sovereign power to take property; (2) without regard for the owner's desires; and (3) for a public use.[16]

B. Limitations Upon the Power of Eminent Domain

Constitutions play a vital role in eminent domain law, but they are not the source of eminent domain power as is commonly believed. Rather, they place limitations upon that power.[17] The U.S. Constitution and all of the state constitutions, except one, place two general limitations upon the power of eminent domain: (1) no one is to be deprived of property without *due process of law;* and (2) private property cannot be taken for a public use unless *just compensation* is paid

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[12]Kohl v. United States, 91 U.S. 367, 372 (1876); West, Inc. v. United States, 374 F.2d 218, 221 (5th Cir. 1967).

[13]Comment, *Distinguishing Eminent Domain from Police Power and Tort,* 38 WASH. L. REV. 607 (1963).

[14]*See* Lenhoff, *Development of the Concept of Eminent Domain,* 42 COLUM. L. REV. 596, 599 (1942).

[15]*See, e.g.,* Texas Gas Transmission Corp. v. City of Greenville, 242 So. 2d 686, 689 (Miss. 1970), which held that annexation is not equivalent to a taking of property; Havran, *Eminent Domain and the Police Power,* 5 NOTRE DAME LAW. 380, 383 (1930), stating that police power differs in that it benefits the public welfare by regulating or restricting property use, whereas, eminent domaint involves an actual taking of the property; Stoebuck, *A General Theory of Eminent Domain,* 47 WASH. L. REV. 553, 572 (1972), stating that a taxation differs from eminent domain to the greater extent in the manners in which the powers are exercised.

[16]Comment, *Components of Eminent Domain: An Ancient Tool for Contemporary Use,* 15 S.C.L. REV. 943 (1963); *see* Murphree v. Henson, 267 So. 2d 414, 425 (Ala. 1972), which held eminent domain takings to be in the nature of a forced sale. *See generally* Pearl River Valley Supply Dist. v. Brown, 248 Miss. 4, 9, 156 So. 2d 572, 577 (1963) which held that an incidental private use resulting from the taking is not unconstitutional.

[17]Boom Co. v. Patterson, 98 U.S. 403, 406 (1878); State v. Woodham, 264 So. 2d 166, 171 (Ala. 1972); Steele v. County Comm'rs of Madison County, 83 Ala. 304, 3 So. 761, 762 (1888); Wise v. Yazoo City, 96 Miss. 507, 509, 51 So. 453, 455 (1910); Brown v. Beatty, 34 Miss. 227, 239 (1857); Havran, *supra* note 15, at 382; Lenhoff, *supra* note 14, at 596; Note, 4 GEO. WASH. L. REV. 130, 134 (1935).

for the property.[18] These two constitutional limitations did not originate with our constitutions, but instead, are statements of principles formulated long before our constitutions were created.[19]

The "due process" clauses of the various constitutions are designed to prevent an arbitrary exercise of governmental power in relation to the established principles of private property rights.[20] There must, therefore, be a public necessity for the taking. But whether or not a public necessity exists is a question for the legislature to answer,[21] and the property owner is not entitled to be present at the meeting where this question is decided. The term "public necessity" should not, however, be confused with the term "public use," which is one of the components of eminent domain,[22] and is a question to be answered by the judiciary.[23]

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[18]Paulk v. Housing Authority of City of Tupelo, 195 So. 2d 488, 490 (Miss. 1967); U.S. CONST. amend. V. (which states in part, "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."); MISS. CONST. art. 3, § 14 (which states in part, "No person shall be deprived of . . . property except by due process of law."); MISS. CONST. art. 3, § 17 (which states in part, "Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; . . . ."); Dickinson, *Leading Limitations Upon the Exercise of the Right of Eminent Domain,* 1 CORN. L.J. 1, 19 (1894); McKean, *supra* note 11, at 18; Stoebuck, *supra* note 15, at 554 (which states that the lone exception is North Carolina, however, the state courts in North Carolina have implied the limitations); Comment, *Future Interests—Effect of Eminent Domain Proceedings,* 34 MICH. L. REV. 530, 531 (1936); Comment, *supra* note 16.

[19]Stoebuck, *supra* note 15, at 556.

[20]Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819); Hutchinson Co. v. Coughlin, 42 Cal. App. 664, 184 P. 435, 437 (Dist. Ct. App. 1919); LeClair v. White, 117 Me. 335, 104 A. 516, 518 (1918); Gunter v. Town of Sanford, 186 N.C. 452, 120 S.E. 41, 43 (1923).

[21]Sears v. City of Akron, 246 U.S. 242, 251 (1918); Paulk v. Housing Authority of City of Tupelo, 195 So. 2d 488, 490 (Miss. 1967); New Orleans, J. & G.N.R.R. v. Hemphill, 35 Miss. 17, 24 (1858); ABA COMM. ON CONDEMNATION AND CONDEMNATION PROCEDURE 37 (1972).

[22]*See* text accompanying note 16 *supra.*

[23]Texas Gas Transmission Corp. v. Council, 199 So. 2d 247, 249 (Miss. 1967); MISS. CONST. art. 3, § 17 (which states in part ". . . whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public."). *But see* Berman v. Parker, 348 U.S. 26, 29 (1954), in which the Supreme Court held that the role of the judiciary is limited in respect to determining "public use" and allowed the decision to turn upon the fact that the taking was for an object within the regulatory power of the federal government. This decision opens the door to the possibility of removing the constitutional requirement of "public use."

The judiciary has also been burdened with determining what the term "just compensation" embodies.[24] The interpretation given to "just compensation" or "due compensation," as it is sometimes called, is critical in eminent domain litigation, since the United States Supreme Court has held that payment of compensation is a requisite part of a property owner's due process guarantee, and therefore the 14th amendment is made applicable to the state's power of eminent domain.[25] Some state constitutions add a further specification upon the payment of compensation by requiring that the compensation be paid prior to the taking of the property.[26] Mississippi, as most other states, requires that compensation be paid, not only for the taking of property, but also for the damaging of property.[27]

II. Mississippi Procedure

A. In General

The purpose of eminent domain procedure is to provide an arena within which the battles, which are an inevitable result of the state's forcible taking of private property, can be fought.[28] Eminent domain proceedings usually originate in statutes and are designed to allow deprivation of property against the owner's wishes.[29] Because of this involuntary deprivation of property the courts have required strict statutory compliance by condemnors.[30]

There are two different methods of procedure used in eminent domain proceedings—administrative and judicial.[31] The administrative method is the more expedient of the two, especially when viewed by the condemnor because it allows him to obtain title to and possession of the property without any form of an official sanction by a court or

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[24]Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893); Isom v. Mississippi Cent. R.R., 36 Miss. 300, 314 (1858); Stoebuck, *supra* note 15, at 575.

[25]Griggs v. Allegheny County, 369 U.S. 84, 85 (1962).

[26]Ala. Const. art. I, § 23; Cal. Const. art. I, § 14; Fla. Const. art. XVII, § 29; Ga. Const. art. I, § III, ¶ 1; Iowa Const. art. I, § 18; Ky. Const. § 13 and § 242; La. Const art. I, § 2; Md. Const. art. III, § 40; Miss. Const. art. 3, § 17; Ore. Const. art. I, § 18 & art. XI, § 4.

[27]Miss. Const. art. 3, § 17.

[28]Wasserman, *Procedure in Eminent Domain,* 11 Mercer L. Rev. 245, 247 (1960).

[29]I. Levey, Condemnation in U.S.A. § 39, at 435 (1969).

[30]Valleybrook Developers, Inc. v. Gulf Power Co., 272 So. 2d 167, 169 (Fla. 1973); Woodside v. City of Atlanta, 214 Ga. 75, 103 S.E.2d 108, 113 (1958); McAuliffe & Burke Co. v. Boston Housing Authority, 334 Mass. 428, 133 N.E.2d 493, 495 (1956); Mississippi Power Co. v. Leggett, 197 So. 2d 475, 479 (Miss. 1967).

[31]Wasserman, *supra* note 28, at 260.

a judge.[32] The burden of commencing an eminent domain proceeding through the administrative method is upon the property owner.[33] This may be the reason that only a few states use the administrative method of procedure.[34]

The more popular judicial method, which is used by the vast majority of the states,[35] embodies traditional court proceedings and requires that the condemnor initiate the eminent domain court action.[36] Several other advantages of this method are: (1) all interested parties are brought into the action; (2) the collection of the award is disencumbered; and (3) the condemnor may reserve the right to abandon the condemnation.[37] The major disadvantage of the judicial method is that an unusually long delay may occur between the commencement of the proceeding and the time of the payment of compensation and transfer of possession.[38]

B. Scope

The number of entities that have been given the right of eminent domain in Mississippi seems endless,[39] and even though the state has the authority to delegate its sovereign power of eminent domain to political subdivisions and other corporate bodies, the delegation of the power carries with it the same limitations which have been placed upon the state's power of eminent domain.

Mississippi's latest eminent domain procedure statutes do not apply to the appropriation of property by levee boards or drainage district commissioners,[40] nor do they affect any eminent domain proceeding commenced prior to January 1, 1972, except in relation to the provisions concerning direct appeals to the Mississippi Supreme Court, in which case the provisions of the 1972 statutes are applicable to actions

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[32]D. GUY, STATE HIGHWAY CONDEMNATION PROCEDURES 21 (1971).

[33]Wasserman, *supra* note 28, at 260.

[34]*See* GUY, *supra* note 32 (in 1971 eight states were using the administrative method: Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Wisconsin).

[35]GUY, *supra* note 32.

[36]*Id.*

[37]Stevens, *Suggestions for Amendment of the Proposed Code of Procedure Involving Eminent Domain*, 6 KAN. JUD. COUNCIL BULL. 69 (1932), *as cited in* Wasserman, *supra* note 28, at 263.

[38]Wasserman, *supra* note 28, at 263.

[39]*E.g.*, MISS. CODE ANN. §§ 2749-01, -18, -21, -22, -23, -24, -25, 2910-21, 2998.7-28, 3374-128, -165, 3665-09 (Supp. 1972).

[40]MISS. CODE ANN. § 2749-17 (Supp. 1972).

pending in the courts on January 1, 1972, if no appeal has yet been taken.[41]

There are three general acts which are the substance of Mississippi's recent revision of its eminent domain law. Only one of the acts actually deals with Mississippi procedure,[42] while the other two are the result of federal influence and are related to policy considerations and the reimbursement of the relocation costs of condemnees.[43]

Ordinarily, statutory law will state which court has jurisdiction of the eminent domain proceedings,[44] and Mississippi's statutes are no exception.[45] A special court of eminent domain, which includes a jury, has been created by statute.[46] A major revision concerning court jurisdiction removed the eminent domain proceedings from the jurisdiction and power of the Mississippi justice of the peace system,[47] and placed the original powers and jurisdiction in the county court of each county; however, if no county court exists in a county, then the circuit court of that county is the proper forum.[48] The eminent domain proceedings may be held in termtime, in vacation, or during a combination of both.[49]

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[41]Ch. 520, § 27, [1971] Miss. Gen. Laws.

[42]MISS. CODE ANN. §§ 2749-01 to -26 (Supp. 1972).

[43]*Id.* §§ 2749-51 to -58 (Supp. 1972); *Id.* §§ 2749-71 to -85 (Supp. 1972).

[44]LEVEY, *supra* note 29, § 49, at 474.

[45]MISS. CODE ANN. § 2749-02 (Supp. 1972); New Orleans, B.R., V. & M. R.R. v. Drake, 60 Miss. 621, 626 (1882), stating:

> [t]he [Mississippi] Constitution, recognizing the right of the State to take private property for public use, imposes on its exercise the limitation that it must be 'upon due compensation first being made to the owner thereof, in a manner to be provided by law, [identical to the present constitutional phrase, art. 3, § 17] and leaves it to the Legislature to provide by law for the ascertainment of the due compensation required. In making provision for this, the Legislature may select the court on which to devolve the duty of determining what is due compensation to the owner.

[46]MISS. CODE ANN. § 2749-02 (Supp. 1972).

[47]Other than one's individual experience with the justice of the peace system in Mississippi, there is no source of information which could adequately state the need for and the wisdom of this change.

[48]MISS. CODE ANN. § 2749-02 (Supp. 1972). *See generally id.* § 2749-16 (Supp. 1972) which states that when the property sought to be condemned is in more than one county the proceedings *may* be instituted in either county, subject to the provision regarding the consolidation of suits. *Id.* § 2749-07 (Supp. 1972). Under the prior statutes, unless property, which extended into more than one county, was owned by one individual or jointly by several individuals, the proceedings to condemn the property were required to be separately held in each county containing a parcel of the property to be condemned. MISS. CODE ANN. § 2772 (1956), *repealed by* ch. 520, § 26, [1971] Miss. Gen. Laws.

[49]MISS. CODE ANN. § 2749-02 (Supp. 1972).

C. *Pre-Hearing Conditions*

In each case there are certain conditions which must precede the assumption of jurisdiction by the court.[50] Several states, including Mississippi, require that the condemnor negotiate with the property owner prior to instituting court action for condemnation.[51] Even with this requirement some jurisdictions do not require a bona fide negotiation attempt, but only require an offer by the condemnor and a refusal by the condemnee.[52] Such administrative abuse is prevented in Mississippi by the Mississippi Supreme Court's requirement that the pre-filing negotiation must be bona fide.[53] Another pre-filing condition is that a formal order or statement be made by the condemnor, stating that public convenience and necessity require the condemnation.[54]

Land surveys by potential condemnors are authorized by statute in most jurisdictions,[55] and although such surveys are not considered a prerequisite to filing suit, they usually precede the suit. There are two major statutory forms used to authorize such entries upon a property owner's land and the two are distinguished by their reference to the damages for which the potential condemnor is liable.[56] The more popular of the two provides liability for damages caused by wantoness, negligence, malice or carelessness, or for actual damages caused while on the land.[57] The other type, within which the Mississippi statute falls, provides liability for damages without enumerating the type or cause of the damages.[58] Mississippi has restricted the use of survey entries to a single purpose—where necessary to select the most advantageous routes or sites.[59] Within this general language, however, a potential condemnor can probably justify any one of the three major reasons for which condemnors generally desire to have a preliminary survey made—(1) to es-

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[50]Louisville & N. R.R. v. Western Union Tel. Co., 107 Miss. 626, 627, 65 So. 650, 651 (1914); *e.g.*, LEVEY, *supra* note 29, at 474 (a publication of notice not completed, or a failure to show a prior agreement).

[51]Dantzler v. Mississippi State Highway Comm'n, 190 Miss. 137, 139, 199 So. 367, 369 (1941); GUY, *supra* note 32, at 25.

[52]Bryant, *supra* note 1, at 269.

[53]Dantzler v. Mississippi State Highway Comm'n, 190 Miss. 137, 139, 199 So. 367, 369 (1941).

[54]Stockstill v. Pearl River County, 236 Miss. 619, 620, 111 So. 2d 413, 414 (1959); Ferguson v. Board of Supervisors of Wilkinson County, 149 Miss. 623, 624, 115 So. 779, 780 (1927).

[55]GUY, *supra* note 32, at 24.

[56]*Id.*

[57]*Id.*

[58]*Id.*

[59]MISS. CODE ANN. § 2749-20 (Supp. 1972).

timate the overall costs; (2) to prevent unnecessary takings; or (3) to remove the need of surveying later.[60]

The several states' statutory provisions relating to the petition filed for condemnation vary widely.[61] Although some states do no more than require the filing of a petition, without statutory reference as to what the petition must contain, most states' statutes spell out in detail the essential allegations of the petition.[62] In Mississippi any person or corporation which has the right to condemn must file a petition with the circuit clerk of the county wherein the property is located.[63] The petitioner must name as defendants all owners, mortgagees, trustees and any other persons having an interest in or lien on the property.[64] Perhaps some of the delay in the judicial method of condemnation would be diminished if the requirement just mentioned, which places the burden upon the petitioner to name all interested parties, were to be modified and the names of unknown interested parties could be added as defendants as the parties are discovered by the petitioner.[65] Petitions filed in Mississippi by the condemnor must contain a detailed description of the property, state with certainty the right to condemn, and identify each defendant's interest or claim in the property.[66]

Mississippi, by providing preferential treatment for eminent domain cases over all nonpreferential cases,[67] has joined several other states which provide preferential treatment for eminent domain cases.[68] More than three-fifths of the states have no provision for preferential treatment.[69] Usually such treatment will benefit both the condemnor and the condemnee if an early termination of the suit can be secured because the condemnor may need to begin construction, while the condemnee, who cannot otherwise dispose of his property, may need the money.[70]

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[60]*See* GUY, *supra* note 32, at 24.

[61]GUY, *supra* note 32, at 33.

[62]*Id.*

[63]MISS. CODE ANN. § 2749-03 (Supp. 1972). *See generally id.* § 2749-04 (Supp. 1972), which provides that the petition is to be numbered and docketed as is any other pleading filed in the circuit or county courts.

[64]*Id.* § 2749-03 (Supp. 1972).

[65]*See* Wasserman, *supra* note 28, at 269.

[66]MISS. CODE ANN. § 2749-03 (Supp. 1972).

[67]*Id.*

[68]*E.g.*, CAL. CIV. PRO. CODE § 1264 (West 1972); OHIO REV. CODE ANN. § 5535.05 (1953); TENN. CODE ANN. § 54-919 (1968).

[69]GUY, *supra* note 32, at 66.

[70]*Id.*

Immediately after filing the petition the condemnor must file a *lis pendens* notice in the chancery clerk's office.[71] Before 1972 the *lis pendens* notice was not required, and potential purchasers could be easily duped into buying condemned land by the lack of notice that a condemnation proceeding was in progress.

After the petition has been filed and presented to the judge, the judge by written order sets the time and location for the hearing.[72] A property owner is constitutionally entitled to receive notice of the hearing, since this is the hearing at which the compensation for the property is to be determined.[73] This right to such receipt of notice is no longer questioned.[74] When such notice is required, it must be ". . . reasonably calculated, under all the circumstances; to apprise interested parties of the pendency of the action. . . ."[75]

The manner in which notice of the hearing is given is not uniform throughout the states, though most jurisdictions do have detailed statutory provisions concerning the manner of serving the notice.[76] Only two states, North Dakota and Utah, have failed to provide for service of process in condemnation proceedings. Presumably the usual civil procedure for service of process in those states would apply.[77] In Mississippi the normal service of process procedure has been incorporated into the condemnation proceedings, except that notice must be served not less than 30 days prior to the hearing, or the hearing date will be continued until all defendants have received 30 days' notice.[78] Since prior to the 1972 statutes the defendant was entitled to only 2 days'

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[71]Miss. Code Ann. § 2749-04 (Supp. 1972).

[72]*Id.*

[73]State Highway Dep't v. Smith, 219 Ga. 800, 136 S.E.2d 334, 337 (1964) (which held that notice is required to be given only for the introduction of compensation or valuation evidence); Van Voorhis v. State, 21 Misc. 2d 86, 197 N.Y.S.2d 119, 121 (Ct. Cl. 1960) (which held the state could appropriate lands without serving notice).

[74]Arkansas State Highway Comm'n v. Roberts, 455 S.W.2d 125, 127 (Ark. 1970). *But see* Swett v. Mississippi State Highway Comm'n, 193 So. 2d 596, 599 (Miss. 1967) (which held that acceptance of an offered value is a waiver of the condemnee's court action).

[75]Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1949). *See also* Miss. Code Ann. § 2749-05 (Supp. 1972) (which states the more restrictive regulations regarding service of notice upon, and the purchasing of property belonging to certain classes of individuals, *i.e.*, infants, persons of unsound mind, non-residents, and decedents).

[76]Guy, *supra* note 32, at 39-41.

[77]*Id.*

[78]Miss. Code Ann. § 2749-04 (Supp. 1972).

notice,[79] the new 30-day notice provision is quite an improvement in the protection of the property owner's rights.

The most common time for issuing notice of the hearing to the defendants is immediately following the filing of the condemnor's petition.[80] A twofold purpose is served by the issuance of process at that time: (1) it prevents manipulation of the property by speculators, and (2) it provides the defendants with notice of the taking at the earliest possible time.[81] Thirty-nine states require that the notice given contain the time and the place of the hearing.[82] Mississippi has not specified by statute when the notice must be issued, nor does the statute state whether the notice must contain the time and place of the hearing.[83] In actual practice, however, the notice is issued immediately following the judge's order which includes a statement of the time and place of the hearing.[84]

Pleadings in eminent domain proceedings vary greatly from state to state. The only real uniformity apparently is that most jurisdictions do not have statutes requiring the condemnee to file an answer to the condemnor's initial pleading.[85] Of the states that require an answer the amount of detail involved varies from the California provision which simply states that "[e]ach defendant must, by answer, set forth his estate or interest in each parcel of property described in the complaint and the amount, if any, which he claims for each of the several items of damage . . . .,"[86] to the detailed requirements set forth in the New Mexico statutes.[87] Mississippi's new statute requires that both the condemnor and the condemnee file a "pleading of value."[88] The pleading, which the condemnor and condemnee must file and serve[89] not less than 20 and 10 days respectively prior to the hearing

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[79]MISS. CODE ANN. § 2755 (1956), *repealed by* ch. 520, § 26, [1971] Miss. Gen. Laws.

[80]GUY, *supra* note 32, at 40.

[81]Wasserman, *supra* note 28, at 270.

[82]GUY, *supra* note 32, at 40.

[83]*See* MISS. CODE ANN. § 2749-04 (Supp. 1972).

[84]Telephone conversations on May 28, 1973, with the circuit clerks of Hinds, Jackson, and Lafayette counties, Mississippi.

[85]GUY, *supra* note 32, at 35.

[86]CAL. CIV. PRO. CODE § 1246 (West 1972).

[87]*See* N.M. STAT. ANN. § 22-9-45 (Supp. 1971).

[88]MISS. CODE ANN. § 2749-04 (Supp. 1972). For the sake of simplicity think of the condemnor's original petition as the device for getting a special court of eminent domain "created," not as a pleading by the condemnor *per se*.

[89]The phrase "file and serve" means that the petitioner or defendant must not only file his pleading with the circuit clerk, but must also serve the pleading upon the opposing parties or their representatives.

date,[90] must state what they have determined to be the fair market value[91] of the property to be taken, the highest and best use of the property, and the damages,[92] if any, to the remainder of the property, if the entire property is not to be taken.[93] The two pleadings of value are the only pleadings, other than the original petition for condemnation, which are required in Mississippi eminent domain cases and are treated as any other circuit or county court civil pleadings.[94] The limiting of the pleadings to that of value may appear overrestrictive, but actually it is a logical and worthwhile innovation since the sole purpose and the ultimate issue in a court of eminent domain is the determination of due compensation.[95]

Since property values usually fluctuate, a date or time of valuation should be set to provide for the proper assessment of value.[96] Although approximately one-half of the states do not have statutory provisions to designate a date of valuation,[97] of those that do, the most commonly used dates are the date of entry upon the land by the condemnor, the date of the filing of the petition, the date of the service of summons, the date of the impaneling of the jury, and the date that the award is determined.[98] Theoretically the best time of valuation is at the time of the "taking" of the property.[99] Due to an erroneous conclusion

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[90]MISS. CODE ANN. § 2749-04 (Supp. 1972).

[91]*See generally* SPECIAL TECHNICAL COMMITTEE OF THE EDUCATION COMMITTEE, AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE 21 (5th ed. 1967) (market value has been defined as the highest price that a willing buyer will pay to a willing seller, neither being obligated to buy or sell, both being informed of *the highest and best use of the property* and allowing a reasonable time for exposure on the open market); Bigham, *"Fair Market Value," "Just Compensation," and the Constitutions: A Critical View*, 24 VAND. L. REV. 63, 68 (1970) ("The definition of 'fair market value' assumes valuation based on the 'highest and best use' to which the property can be put as of the date of taking.").

[92]*See generally* MISS. CODE ANN. § 2749-04 (Supp. 1972) (the elements of damage must be itemized).

[93]MISS. CODE ANN. § 2749-04 (Supp. 1972).

[94]*Id.* (the time allowed for either pleading may be increased or decreased by the judge for good cause shown).

[95]Evans v. Mississippi Power Co., 206 So. 2d 321, 323 (Miss. 1968), (stating the courts sole function is the determination of just compensation); ABA COMMITTEE ON CONDEMNATION PROCEDURE, *supra* note 21, at 49.

[96]Wasserman, *supra* note 28, at 281.

[97]GUY, *supra* note 32, at 53.

[98]*Id.* at 54; Wasserman, *supra* note 28, at 282.

[99]*See also* Stoebuck, *supra* note 15, at 557 (the characteristics of a "taking" are: (1) that a transfer occurs between the state and an individual with the state as the transferee; and (2) that the transfer may be required even over the volatile protests of the individual); Wasserman, *supra* note 28, at 282.

drawn by some writers, the statement has been made that the judicial-method states would find it necessary to set a date of valuation prior to the date of taking, in order to prevent an increase or decrease in the value of the property after the suit has been commenced.[100] The erroneous assumption upon which that statement is based is that the date of taking must be at the termination of the court proceedings. Such a broad assumption is invalid because the date of taking depends upon the law of each state, and the Mississippi Supreme Court has ruled that the date of taking is the date that the suit is instituted by the condemnor.[101] The court's ruling has since been reinforced by the new eminent domain legislation which has set the date of valuation as the date that the condemnor files the petition to condemn.[102] Therefore, in Mississippi and the other states which have given the same date to the "date of valuation" and the "date of taking," there is no significant difference between the two terms; however, in any other state, there is a very real distinction, and the terms should never be used interchangeably.[103]

The advantage of using an early date of valuation, such as the filing date, is that the property is assessed prior to the time that surrounding land owners might have an opportunity to take action which could have an adverse effect upon the property *(i.e.,* moving away and selling at a low price).[104] The major disadvantage of an early valuation date is that the condemnor may be able to take the land at a low price, even though the land is not needed until a much later date, and by the use of delaying tactics will not be required to pay the compensation until a much later date, at which time the property value may have increased considerably.[105] Such action by the condemnor could be remedied by a statutory provision requiring a new assessment of the property upon the expiration of a designated period of time following the date of the filing of the petition to condemn *(e.g.,* if the condemnee does not receive compensation within 1 year after the commencement of the

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[100]Wasserman, *supra* note 28, at 282.

[101]Pearl River Valley Water Supply Dist. v. Wright, 186 So. 2d 205, 206 (Miss. 1966).

[102]MISS. CODE ANN. § 2749-04 (Supp. 1972) (stating that the pleadings of value shall contain a statement of the fair market value of the property as of the date of the filing of the petition); *id.* § 2749-10 (Supp. 1972) (stating that evidence of fair market value shall be established as of the date of the filing of the petition).

[103]*See* Culbertson v. State Road Dep't, 165 So. 2d 255, 256 (Fla. 1964); Bohne v. Bauer, 21 Ill. App. 2d 133, 157 N.E.2d 545, 546 (1959); State *ex el.* Highway Comm'n v. Hackett, 370 S.W.2d 712, 715 (Mo. 1963); Chaloupka v. State Dep't of Roads, 176 Neb. 746, 127 N.W.2d 291, 297 (1964).

[104]Wasserman, *supra* note 28, at 282.

[105]*Id.*

suit, then the property shall be assessed as of the date of the trial, assuming that the delay was caused by the condemnor).[106]

As mentioned earlier, the public-necessity question is within the ambits of the legislature rather than the judiciary,[107] and this has been, and still is, the general rule.[108] Over the years, however, an exception to this rule has developed. The judiciary may, where there has been a lack of discretion, bad faith, or any arbitrary, capricious or fraudulent action by the condemnor, overrule the finding of public necessity by the condemnor.[109]

Aside from the exception stated above, the general rule is also subordinate to any legislative action or constitutional provisions,[110] and even though all the states still place the initial decision upon the legislative body, more than three-fifths of the states have provided for judicial review if the condemnee raises an objection to the decision.[111] Mississippi has provided the condemnee with the opportunity to raise such an objection by the filing of a motion to dismiss the condemnation suit.[112] The objection is only one of three grounds for dismissal. The grounds are: (1) that the petitioner has not been granted the power of eminent domain by the state, (2) that no public necessity for the taking exists, and (3) that the proposed use is not a public use for which private property may be taken.[113] Motions to dismiss, which must be filed at least 5 days before the hearing date, are treated as preference proceedings, and are heard by the judge without a jury.[114] The judge's ruling upon the motion may be immediately appealed to the Mississippi Supreme Court, and the appeal is given preferential treatment upon the docket of the supreme court.[115] Naturally, if the ruling is to dismiss the proceeding, then the proceeding is halted and nothing occurs during the appeal by the condemnor; but, should the

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[106] *Id.*

[107] *See* text accompanying note 21 *supra.*

[108] GUY, *supra* note 32, at 47.

[109] United States v. 209.25 Acres of Land, More or Less, 108 F. Supp. 454, 460 (W.D. Ark. 1952).

[110] GUY, *supra* note 32, at 47.

[111] *Id.* at 49.

[112] MISS. CODE ANN. § 2749-08 (Supp. 1972) (similar objections were allowed under the repealed eminent domain statutes, except instead of filing a motion to dismiss in the special court of eminent domain, the condemnee had to petition the circuit court for a writ of prohibition. The circuit judge would then issue an order staying the eminent domain proceedings until he had decided the issue objected to by the condemnee).

[113] *Id.*

[114] *Id.*

[115] *Id.*

judge rule that there is no ground for dismissal, the appeal by the condemnee will not act as a supersedeas and the trial proceedings shall continue as scheduled.[116]

D. The Hearing

Can two or more condemnation suits be heard jointly? As more and more land is being taken by the state, the land being taken often involves adjacent or similar pieces of property owned by several persons.[117] Some states, to a limited degree, allow these persons to consolidate their suits.[118] In Mississippi the statutory law prior to 1972 appeared to prohibit such consolidation,[119] but now the courts of eminent domain may consolidate the suits if all the parties agree.[120] If utilized properly, the consolidation mechanism could relieve court-calendar congestion that might arise in the future without diluting the rights of any condemnee.

The court officials for special courts of eminent domain are listed by statute, as are their duties,[121] the most important duty being that of providing for a jury at the hearing. Is, however, the condemnee constitutionally entitled to a jury's determination of the compensation? Although some states provide, as a constitutional guarantee, that the condemnee shall receive compensation as determined by a jury, *e.g.*, California,[122] Mississippi condemnees are not entitled by their state constitution to a jury determination. However, there is a statutory provision which provides for a jury in all condemnation suits.[123]

Some writers feel that jury trials in eminent domain proceedings should be abandoned in favor of a commission of qualified experts who would determine the property value and submit their report to a judge for final approval.[124] An abandonment of juries would be advan-

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[116]*Id.*

[117]GUY, *supra* note 32, at 28.

[118]CAL. CIV. PRO. CODE § 1244(5) (West 1972); ILL. ANN. CODE STAT. ch. 47, § 5 (1957); MISS. CODE ANN. § 2749-07 (Supp. 1972); N. D. CENT. CODE § 32-15-19 (1960).

[119]MISS. CODE ANN. § 2756 (1956), *repealed by* ch. 520, § 26, [1971] Miss. Gen. Laws.

[120]MISS. CODE ANN. § 2749-07 (Supp. 1972).

[121]*Id.* § 2749-06.

[122]CAL. CONST. art. I, § 14. *But cf.* Variano v. City of White Plains, 242 F. Supp. 790, 793 (S.D.N.Y. 1965); United States v. 2792.82 Acres of Land, 114 F. Supp. 76, 77 (E.D.S.C. 1953) (which held that jury trials are not constitutionally guaranteed in condemnation proceedings).

[123]MISS. CODE ANN. §§ 2749-02, -06, -07 (Supp. 1972) (12 jurors are selected from 24 persons and each party is entitled to four peremptory challenges and as many challenges for cause as are allowed in circuit court). *See also id.* § 2749-09 (which requires the jury to take a special oath regarding the evidence to be presented.

[124]Wasserman, *supra* note 28, at 280.

tageous in that a uniformity of awards would result, the necessity of submitting repetitious evidence would be removed, and the slow processes of the jury trial would be eliminated.[125] Studies have revealed that there is no appreciable difference in the amounts of compensation awarded by commissions, judges, and juries;[126] therefore, it appears that jury trials are not essential to an equitable recovery of compensation,[127] and that the condemnee might receive the compensation earlier in non-jury proceedings. The only apparent argument against the abandonment of juries can be summed up by this statement: "[s]peed does not guarantee justice or good practice."[128] This statement sounds nice, but fails to recognize that speed can be necessary in arriving at justice in many cases, especially where, as in eminent domain takings, the party seeking the award is unable to function financially until the compensation is received.

The evidentiary rules used in eminent domain proceedings are normally the same rules as those used in other civil trials of the state courts.[129] One evidentiary rule which is frequently the bone of contention between the condemnor and the condemnee is whether or not the jury may be allowed to view the property. Although one-third of the states do not have statutory provisions allowing the jury to view the property,[130] most states provide an opportunity for such a viewing.[131] Normally, either party may request a viewing by the jury, but the request *must* be made out of the presence of the jury, or the judge is required to declare a mistrial,[132] since the jury would be unduly prejudiced if the opposing party objected or if the judge did not allow the viewing.

Another evidentiary rule peculiar to eminent domain proceedings is that evidence of property value presented to the court must be based upon the fair market value of the property, as of the date of filing the

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[125]McNally & Bermant, *The Necessity for One Statewide Eminent Domain Act*, 39 BROOKLYN L. REV. 265, 270 (1972).

[126]GUY, *supra* note 32, at 171-72.

[127]McKean, *supra* note 11, at 26.

[128]McNally & Bermant, *supra* note 125, at 270.

[129]LEVEY, *supra* note 29, § 48, at 465.

[130]GUY, *supra* note 32, at 71.

[131]*E.g.*, TENN. CODE ANN. § 23-1518 (1956) (stating that upon demand a party is entitled to have the jury view the property).

[132]Mississippi State Highway Comm'n v. Smith, 187 Miss. 613, 615, 192 So. 448, 450 (1939) (requiring strict obedience to the rule against making jury-view requests in the jury's presence and holding that even a withdrawal of the statement will not remove the error).

petition.[133] This does not mean, as it might appear, that the assessment of the value of the property cannot include increases or decreases in the property value which have been caused by the prospective taking, but simply means that the assessment can only include the increases or decreases in the value which occurred prior to the filing of the petition.[134] As a practical matter then, when an appraiser is hired, he should be instructed to use the filing date of the petition as the effective date of his report in order to insure that any late valuation changes are included in his report.[135]

Separate from the normal fair market value of the property, but also compensable in eminent domain takings, is any damage that may result from the taking of only a part of the condemnee's property. Such damage may be computed in several ways,[136] but the most widely used method appears to be the "before and after rule" method, which the Mississippi Supreme Court has interpreted as follows:

> . . . [W]hen a part of a tract of land is taken the owner is entitled to be awarded the difference between the fair market value of the whole tract immediately prior to the taking and the fair market value of the remaining tract immediately after the taking without considering the general benefits or injuries resulting from the use to which the land is to be put . . . by the general public. Included in this formula is [*sic*] all damages resulting from the proper use of the land taken, [and] this includes the fair market value of the land taken and if the taking affects the fair market value of the remaining property, it is likewise included in the formula.[137]

The Mississippi legislature has accented one portion of the above rule by providing that, when determining damages, nothing is to be deducted

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[133]MISS. CODE ANN. § 2749-10 (Supp. 1972). *See also* Pearl River Valley Water Supply Dist. v. Wright, 203 So. 2d 296, 297 (Miss. 1967).

[134]Paulk v. Housing Authority of the City of Tupelo, 204 So. 2d 153, 154 (Miss. 1967), which allowed the value to be determined according to the property's use which had recently been changed as a result of the city's urban renewal plan, thereby causing an increase in the value of the property shortly before the filing of the suit.

[135]*See generally* SPECIAL TECHNICAL COMMITTEE OF THE EDUCATION COMMITTEE, *supra* note 91, for extensive coverage of the appraisal process, the methods of determining compensation, and other practical information regarding property valuation.

[136]29 GEO. L.J. 790 (1941).

[137]Mississippi State Highway Comm'n v. McArn, 246 So. 2d 512, 515 (Miss. 1971); *accord,* Emerson v. Mississippi State Highway Comm'n, 208 So. 2d 441, 442 (Miss. 1968).

from the amount determined as value on account of the projected benefits incident to the proposed public use.[138]

Upon the completion of the presentation of evidence, Mississippi, unlike some other states, provides an opportunity for either party to present an oral argument and jury instructions.[139] After the arguments and instructions have been presented, the only remaining events in the proceedings are the verdict and the judgment.

More than 75 percent of the states have statutes to control the form and content of the verdict;[140] yet, less than 25 percent have a statutory provision stating how many jurors must agree in order to reach a verdict.[141] Mississippi has provided by statute that only nine of the 12 jurors need to concur in order to reach a verdict.[142]

Following the jury verdict, the judge simply enters the court's judgment. Although the entry of judgment may be simple, a problem as to the amount of the judgment has been the subject of as much litigation as any other area of eminent domain law, and both the theorists and practitioners have yet to find a common ground of agreement upon this issue, *i.e.*, whether or not the condemnee is entitled to interest on the judgment. The more accepted view has been that, unless a statute expressly grants the interest, the property owner is not entitled to it.[143] Another factor which is of utmost importance when trying to determine if there is a right to interest, is the division of the interest into two categories—(1) interest on the award, and (2) interest as a part of the award.[144] To be certain that you, your opponent, and the judge are discussing the same issue, you must be sure that you determine which of the two categories is in issue.

The first category, interest on the award, is the penalty assessed for the condemnor's failure to pay the award at the proper time and within the period provided by statute.[145] As can be seen, this is quite

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[138]Miss. Code Ann. § 2749-11 (Supp. 1972).

[139]*Id.* § 2749-10. *See also* Guy, *supra* note 32, at 73.

[140]Guy, *supra* note 32, at 77; *e.g.*, Miss. Code Ann. § 2749-12 (Supp. 1972), stating that the form shall be: "we, the jury, find that the defendant (naming him) will be damaged by the acquisition of his property for the public use, in the sum of ..... Dollars."

[141]Guy, *supra* note 32, at 77.

[142]Miss. Code Ann. § 2749-12 (Supp. 1972).

[143]Nichols, *Interest on Condemnation Awards*, 1 Legal Notes on Local Gov't 4 (1936).

[144]Levey, *supra* note 29, § 46, at 461.

[145]*See* Mississippi State Highway Comm'n v. Herring, 241 Miss. 729, 133 So. 2d 895 (1961); Mississippi State Highway Comm'n v. Burwell, 206 Miss. 498, 40 So. 2d 263 (1949); Levey, *supra* note 29, § 46, at 461.

different from the normal civil suit in which the party is entitled to the award at the time that it is awarded to him. Unless there is a statutory provision to the contrary, the property owner in an eminent domain suit is not entitled to the award until he has lost possession of the property. It necessarily follows that until payment of the award is due, no interest should begin to accrue on the award.[146] In those states where there is no statutory provision designating a time or date for the payment of the award, the burden falls upon the courts to determine the date. Once again the importance of the interpretation given to the term "taking" becomes apparent. Whether the taking occurs at the time of actual dispossession or at an earlier constructive dispossession date is determined by the court[147] and whatever interpretation is given in that state seals the fate of the condemnee in relation to whether he is entitled to interest on the award and from what date that interest, if any, shall accrue.

A caveat for those who are anxious to accept a late payment of the award for any reason: the acceptance of a payment which does not include the interest on the award without objecting to the deficiency will be considered to be a waiver of the interest due.[148]

The second category, interest as part of the award, has been held by the United States Supreme Court to be a component of due compensation.[149] The logic upon which such a payment of interest is grounded is that if an owner is deprived of the use and possession of his land, he should be paid interest on the value of the land from the time of the taking.[150] The ever present necessity of obtaining the court's interpretation of the term "taking" has once again reared its head, and in this set of circumstances the courts, when computing the amount of interest, have usually held that takings relate back to the date of the order of condemnation;[151] however, where statutory provisions exist concerning such interest payments, the statute will usually set a specific date from which the interest will accrue, with the interest continuing to accrue until the date of the judgment.[152] Interest as a part of the award, un-

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[146]31 ILL. L. REV. 398 (1936).

[147]Nichols, *supra* note 143, at 4; *see* Feldman v. City of Chicago, 363 Ill. 247, 2 N.E.2d 102, 103 (1936), wherein the court held interest was due on the judgment from the date of the award to the date of payment.

[148]LEVEY, *supra* note 29, § 46, at 463.

[149]Jacobs v. United States, 290 U.S. 13, 16-17 (1933).

[150]Wilkerson, *Condemnation Suits Accrual of Interest,* 28 TENN. L. REV. 516 (1961).

[151]Nashville Housing Authority v. Doyle, 197 Tenn. 555, 276 S.W.2d 722, 723 (1955); State v. Hair, 24 Tenn. App. 298, 143 S.W.2d 893, 896 (1940).

[152]LEVEY, *supra* note 29, § 46, at 461.

like the interest on the award, cannot be waived by the condemnee in any manner, not even by issuing a receipt marked "paid in full."[153]

The Mississippi Legislature has placed the problem of interest out of the reach of litigation as to the issues raised in the above discussion by simply stating that after January 1, 1972, any judgment finally entered in payment of property taken must include the legal interest on the award from the filing date of the petition to the date payment is actually made.[154] The only exception to this provision is that no interest shall accrue on money deposited by the condemnor which is withdrawn by the condemnee prior to judgment.[155]

E. Post-Hearing Activity

The costs of the proceedings should be borne by the condemnor, since the condemnee, if required to pay the costs, might be vulnerable to the condemnor's threats of high court costs, and therefore, willing to settle for an unfair offer. Also, if the condemnee were required to pay the costs he would be deprived of the full amount awarded as compensation and would therefore be deprived of the due compensation guaranteed to him by the state and federal constitutions.[156] Therefore, even though states normally are not required to pay costs, such may be required when a conflict with the "due process" clauses is present.[157] The statutory language regarding the payment of court costs in Mississippi is unclear, but a loose reading of the statute appears to require the condemnor to pay the costs in all eminent domain proceedings.[158]

The actual transfer of title to property in Mississippi occurs upon the payment of the judgment (minus any deposit which the condemnor made earlier) and the court costs.[159] Of course if the deposit was in excess of the final judgment, the excess is to be returned to the condemnor.[160]

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[153]*Id.* at 463.

[154]Miss. Code Ann. §§ 2749-10, -13 (Supp. 1972).

[155]*Id.* § 2749-10.

[156]Mississippi State Highway Comm'n v. Mason, 192 Miss. 576, 577, 6 So. 2d 468, 469 (1942).

[157]Pearl River Valley Water Supply Dist. v. Brown, 254 Miss. 685, 686, 184 So. 2d 407, 408 (1966); State Highway Comm'n v. Mason, 192 Miss. 576, 577, 6 So. 2d 468, 469 (1942); Levey, *supra* note 29, § 47, at 463.

[158]Miss. Code Ann. §§ 2749-13, -14 (Supp. 1972).

[159]*Id.* § 2749-14.

[160]*Id.*

Normally the condemnee is not entitled to any expenses incurred in the proceedings,[161] but there are occasions which will allow the condemnee to recover his reasonable expenses, including attorney fees.[162] To recover those expenses one of the following must occur: (1) the condemnor must fail to pay the judgment and court costs within 90 days of the final judgment;[163] or (2) the case must be dismissed by the condemnor;[164] or (3) the court must determine that the condemnor is not entitled to judgment because of a lack of power to take the property.[165]

Although a condemnee may appeal from the special court of eminent domain directly to the Mississippi Supreme Court, the legislature has provided that such an appeal shall neither operate as a supersedeas, nor delay the condemnor's entry upon the property.[166] Most state appellate courts, including the Mississippi Supreme Court, will affirm the lower court judgment[167] unless an error of law in estimating the damages has occurred, or the jury's award appears to be so inadequate or excessive as to shock the court's conscience.[168] The Mississippi Supreme Court normally requires that the award be either above or below the evidentiary boundaries of estimates of value before it will reverse on grounds of inadequacy or excessiveness of the award.[169]

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[161]City of Jackson v. Lee, 234 Miss. 502, 505, 106 So. 2d 892, 895 (1958), held that unless a statute expressly or by necessary implication imposes such expenses upon the condemnor, there can be no recovery of the expenses by the condemnee—in this particular case there existed an abandonment of the suit which thereby allowed recovery; Meridian & M. R.R. v. Betheze, 111 Miss. 810, 811, 72 So. 233, 234 (1916).

[162]MISS. CODE ANN. § 2749-19 (Supp. 1972).

[163]If the condemnor has appealed, the 90-day limit begins to run from the date the case was affirmed.

[164]This is not applicable if the dismissal was effected by a settlement.

[165]This refers to the grounds for a motion to dismiss which were discussed earlier.

[166]MISS. CODE ANN. § 2749-15 (Supp. 1972).

[167]Arkansas State Highway Comm'n v. Sargent, 241 Ark. 783, 410 S.W.2d 381, 383 (1967); Commonwealth Dep't of Highways v. Vaughn, 390 S.W.2d 146, 149 (Ky. 1965); State v. Hill, 408 S.W.2d 213, 223 (Tenn. 1965).

[168]In order to shock the court's conscience the jury award must appear to have been based upon passion or prejudice; *see* Mississippi State Highway Comm'n v. Rogers, 271 So. 2d 731, 733 (Miss. 1973); Mississippi State Highway Comm'n v. Rives, 271 So. 2d 725, 729 (Miss. 1972); Jackson County Development, Inc. v. Mississippi State Highway Comm'n, 262 So. 2d 416, 418 (Miss. 1972); Mississippi State Highway Comm'n v. Reeves, 257 So. 2d 527, 528 (Miss. 1972).

[169]Mississippi State Highway Comm'n v. Haggard, 248 So. 2d 639 (Miss. 1971); Mississippi State Highway Comm'n v. McArn, 246 So. 2d 512, 515 (Miss. 1971); Mississippi State Highway Comm'n v. Smith, 240 So. 2d 704, 706 (Miss. 1970); Mississippi State Highway Comm'n v. Frierson, 240 So. 2d 457, 459 (Miss. 1970).

The Misissippi statute which describes the appellate procedure for eminent domain cases provides that the defendant must post bond to cover any costs that might be incurred by the appeal.[170] The statute contains no reference as to whether or not the condemnee will in the end be required to pay for the appeal, but it appears to be the natural assumption from the requirement of posting bond. Such costs would effectively remove the guarantee of due compensation and should not be borne by the appellant-condemnee.[171] To remove the burden of costs and yet still prevent frivolous appeals, the costs might be assessed against the appellant-condemnee only if the lower court's judgment is upheld and the amount of the award was within a reasonable value range. Even though this solution is not perfect, at least it would relieve the problem of taxing the condemnee's compensation award in some appellate cases.

III. "Possession Prior to Judgment" alias "Immediate Possession" alias "Quick Take"

A. What Is It?

Eminent domain takings and public benefit projects have become a necessary and integral part of today's society. The old law, providing that the condemnor should not be allowed to enter and possess the condemned property before the final judgement, is no longer a feasible means of accomplishing the twofold purpose of eminent domain procedure—namely to allow for the taking of possession by the condemnor, and to provide for the payment of compensation to the property owner at the earliest possible time.[172] Thus, the need for a more efficient procedure and an earlier taking of possession has been recognized by both the condemnor and the condemnee.[173]

When the state needs property, the date of possession is of the utmost importance. The contractual obligations into which the state must enter, and the prior planning of access to the property sites are only two of several reasons that a definite date of taking needs to be set. Otherwise, the state's action could easily result in suits for the breach of contracts, delays in the relocation of utilities and the re-

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[170]Miss. Code Ann. § 2749-15 (Supp. 1972).

[171]Pearl River Valley Water Supply Dist. v. Brown, 254 Miss. 700, 701, 184 So. 2d 407, 408 (1966).

[172]Taylor, *Possession Prior to Final Judgment in California Condemnation Procedure*, 7 Santa Clara Law. 37, 45 (1966).

[173]3 P. Rohan & M. Reskin, Condemnation Procedures and Techniques § 2.03[1], at 2-7 (1973).

moval of obstructions, and an increase in taxes and utility rates.[174] At the same time, property owners are placed in a position of financial hardship because they have been deprived of their property rights; yet, they must finance the expenses of relocating their families or businesses to suitable replacement property and provide for the costs of litigation (*i.e.*, attorneys' fees and appraisers' fees), all without the benefit of compensation for the property rights lost.[175]

To remedy the inadequacies of the law regarding the taking of property in certain circumstances, most states have adopted what have been called "immediate possession" or "quick take" statutes.[176] Such provisions usually provide for an earlier date of taking and an earlier date of compensation than would ordinarily occur and therefore relieve much of the difficulty suffered by both the condemnors and condemnees in the past. These provisions do not include possession obtained by administrative action prior to judicial proceedings,[177] as some writers believe,[178] but instead, only possession taken during judicial proceedings and prior to final judgment.[179] The phrases often used to describe the takings have been "the right to immediate possession" or "the right to quick take the property," but it is more correct to refer to the takings as "possession prior to judgment."[180]

B. The Exercise of the Right of "Possession Prior to Judgement"

Prior to the present statutory provision in Mississippi, which allows for possession prior to judgment by the condemnor,[181] this state had never had a possession-prior-to-judgment statute *per se*. There are and have been a few statutory provisions which were closely related to such possessions, but their effectiveness was and still is in the area of inverse condemnation,[182] rather than in the usual state condemnation procedure.

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[174]Taylor, *supra* note 172, at 45.

[175]*Id.* at 48.

[176]HIGHWAY RESEARCH BOARD, SPECIAL REPORT 33: CONDEMNATION OF PROPERTY FOR HIGHWAY PURPOSES 29 (1958), *cited in* Taylor, *supra* note 172, at 40.

[177]Taylor, *supra* note 172, at 39 n.6.

[178]Wasserman, *supra* note 28, at 275.

[179]Taylor, *supra* note 172, at 39 n.6.

[180]*Id.* at 39.

[181]MISS. CODE ANN. § 2749-04.5 (Supp. 1972).

[182]*See, e.g.*, MISS. CODE of 1906 § 4402; HEMINGWAY'S CODE § 7082; MISS. CODE ANN. §§ 8316, 8507 (1956). *See also* 3 P. ROHAN & M. RESKIN, *supra* note 173, at 14-19, which indicates that inverse condemnation occurs when a public agency has so interfered with property, even if the agency did not intend such an interference, that the owner can no longer enjoy its use.

Possession prior to judgment is limited by statute in two ways: (1) only specific agencies have been granted the right, and (2) those agencies can exercise that power for only a limited number of uses.[183] The Mississippi State Highway Commission has the right to possess property prior to judgment, but only for the purpose of acquiring highway rights-of-way.[184] Municipalities have the same right, but only for the purpose of "acquiring rights-of-way to connect existing roads and streets to highways constructed or to be constructed by the Highway Commission. . . ."[185] Also, any municipality with a population in excess of 100,000 has the right of possession prior to judgment for the purpose of acquiring rights-of-way for the widening of existing municipal streets.[186] Other than the three specific conditions just mentioned, neither the state nor any of its agencies can exercise the right to possession prior to judgment.

The cornerstones of the possession-prior-to-judgment provisions are the requirements that a court order must be obtained by the condemnor for the possession, and that the condemnor must deposit an estimated value of compensation in court for the condemnee. In a judicial-method state, such as Mississippi, no possession-prior-to-judgment statute could be valid without the presence of both of these factors.[187]

To obtain the court order in Mississippi, the condemnor must state in his original petition to condemn that possession prior to judgment is desired.[188] Once the judge is certain that the defendants have received notice, he will appoint an appraiser to estimate the value of the property and to file a report within 10 days of his court appointment, containing his opinion of value and the reason for his opinion.[189] The report must be sworn to and must state the following:

> (1) the fair market value of the property to be condemned, determined as of the date of the filing of the petition;
>
> (2) the damages, if any, to the remainder if less than the whole is taken, giving a total [of the] compensation and damages to be due as determined by the appraiser; and
>
> (3) his opinion as to the highest and best use of the property, a narrative of the facts pertaining to his appraisal.[190]

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[183] MISS. CODE ANN. § 2749-04.5 (e) (Supp. 1972).

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *See generally* Taylor, *supra* note 172, at 41 n.14.

[188] MISS. CODE ANN. § 2749-04.5 (a) (Supp. 1972).

[189] *Id.*

[190] *Id.*

The report received from the appraiser is not admissible in the condemnation trial as evidence, nor is the court-appointed appraiser allowed to testify in the trial.[191]

When the appraiser's report is filed, the circuit clerk must within 3 days mail a notice of the filing of the report to the parties and to the judge.[192] The judge then reviews the report and grants the petitioner's request, unless, for cause shown, he feels that the entry should be denied.[193] The judge's order cannot, however, be entered until the defendants have had at least 5 days' notice of the report, and the order cannot require a defendant to move from his dwelling or to move his business or farm operation, without a minimum of 90 days' written notice.[194] Other states' notice requirements vary and no standard time has emerged as the proper amount of time for giving notice to the property owners of the impending dispossession or of the proper amount of time for allowing the owners to vacate the premises.[195]

Although some states allow the judge to determine whether or not the condemnor may take possession prior to judgment, as does Mississippi's procedure, it is not mandatory and other states have not provided for any judicial discretion. For example, California, which has had a possession-prior-to-judgment provision since 1918,[196] has been unable during that entire period to develop a judicial stopgap for the taking of possession prior to judgment.[197]

In Mississippi, following the judge's order granting possession prior to judgment, the condemnor must deposit 85 percent of the court-appointed appraiser's estimate of the property value with the court before the right to possession will mature.[198] The defendants are allowed to withdraw the deposit from the court, at any time.[199] To prevent prejudice at the later trial, neither the making of the deposit by the condemnor, nor the withdrawal of the deposit by the condemnee can be used in determining the value of or the damages to the property.[200]

Most other states use one of two other methods for providing the advance payment: (1) the sum equal to the value stated in the de-

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[191] *Id.* § 2749-04.5 (d).
[192] *Id.* § 2749-04.5 (b).
[193] *Id.*
[194] *Id.*
[195] 3 P. ROHAN & M. RESKIN, *supra* note 173, § 2.03 [2], at 2-8.
[196] Taylor, *supra* note 172, at 38.
[197] *Id.* at 83.
[198] MISS. CODE ANN. § 2749-04.5 (b) (Supp. 1972).
[199] *Id.*
[200] *Id.* § 2749-04.5 (d).

claration of taking, or (2) an amount of double the value estimated by the court-appointed appraiser.[201] Both of these methods would provide a more attractive deposit to the defendant than does the Mississippi method, and either would be an improvement.

There are also three methods by which the estimated value of the property may be determined: (1) by the judge's estimation, (2) by a commission report, or (3) by a court appointed appraiser.[202] The court-appointed-appraiser method, which Mississippi uses, would appear to be the most accurate of the three since the appraiser's estimate of value will be based upon a more detailed inspection of the property, along with other factors of which a judge or commission might not be aware, but which a *trained* appraiser would automatically take into account.

Once the estimated value has been determined and that amount deposited with the court, should the condemnor be required to pay interest on the amount deposited? Mississippi's provision for the payment of interest on the deposit is simple and direct, except for the frustrating fact that it does not deal with the deposit *per se*. Instead, the provision states that if the final award is in excess of the amount deposited, then the condemnor must pay interest on the difference and that such interest will accrue from the filing date until the payment date, at the rate of 8 percent per annum.[203] Although not specifically mentioned in the statute, it would appear that if the final judgment is less than[204] or equal to the amount deposited the condemnee is not entitled to any interest upon the deposit.[205] The lack of accrual of interest on the deposit appears to be just if you assume that the condemnee has had the deposit for his own use through his withdrawal of it. Suppose, however, that the condemnee was unaware that a deposit had been made. Should he then have a right to collect interest on the deposit? The Mississippi statute does not answer the question, but the problem could be solved by simply requiring that either the court or the condemnor serve notice upon the condemnee that a deposit has been made and that the condemnee is entitled to withdraw the deposit if he desires.[206]

The Mississippi statute seems to cover the action required when pursuing the possession of property prior to judgment, but what would

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[201] *See* 3 P. ROHAN & M. RESKIN, *supra* note 173, § 3.03 [2], at 3-4.

[202] *Id.*

[203] MISS. CODE ANN. § 2749-04.5 (c) (Supp. 1972).

[204] If the final judgment is for less than the deposit, the condemnor is entitled to a personal judgment against the condemnee for the difference. *Id.*

[205] *See Id.*

[206] Taylor, *supra* note 172, at 92.

occur if the condemnor suddenly decided that the taking was no longer necessary and abandoned the court proceedings after having maintained possession of the property for a period of time? The statute is silent and other statutory provisions, which provide for the payment of expenses of the condemnee when the condemnor has abandoned a normal condemnation suit,[207] cannot be used to provide indemnification to the owner for any damage which has been done to the property during the condemnor's possession. The condemnee is simply left with damaged property.[208] The general rule in other state courts is that possession pending condemnation proceedings creates a vested interest in the landowner and that the condemnor's usual right to abandon is withdrawn upon the taking of possession of the property;[209] however, the Mississippi Supreme Court has not recognized such a rule and in the only decision in point has held that the property owner must file a separate suit in order to recover the damages resulting from such an abandonment.[210] Since the Mississippi decision essentially stands alone, hopefully the Mississippi Supreme Court will adopt the general rule allowing the creation of a vested interest in such cases.

C. Advantages, Disadvantages, and Trends

The majority of the states are more liberal in providing for the exercise of possession prior to judgment[211] than is Mississippi because of its use and agency restrictions. The trend is toward a more permissive regulation allowing prior takings, as long as an approximate amount of the value is paid or deposited.[212] This broadening of the right to possession prior to judgment will benefit both the condemnors and the condemnees, as long as the procedural safeguards are kept in tact.[213]

The possession-prior-to-judgment provisions have been praised as a means of preventing delays in the construction of necessary public projects, and as a way to remove the unfair advantage that an owner has of being able to manipulate, through delaying tactics, the price to be paid.[214] Other advantages which may result from the availability of such provisions are: (1) a uniform possession procedure; (2) assurances

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207Miss. Code Ann. § 2749-19 (Supp. 1972).
208Wasserman, *supra* note 28, at 279.
209Annot., 121 A.L.R. 72 (1939).
210Louisville, N.O. & T.R.R. v. Ryan, 64 Miss. 399, 401, 8 So. 173, 175 (1886).
211Taylor, *supra* note 172, at 40.
212*Id.* at 43.
213*Id.* at 110.
2141958 U. Ill. L.F. 304, 305.

to the condemnor of clear title; (3) access to an appropriate mechanism for obtaining the property when a purchase is impracticable, due to creditors' claims; (4) the removal of the owner's temptation to improve the property during the suit; and (5) an aid to protect the interests of the owner.[215]

Do not be mistaken. The possession-prior-to-judgment provisions are not flawless and are not the ultimate goal to which the theorists, who desire the perfect balance between the rights of the condemnor and the condemnee have aspired. Such provisions have many disadvantages, not the least of which is administrative abuse.

California, which has had provisions for the possession of property prior to judgment for more than 50 years, has suffered through many problems related to such takings.[216] Administrative abuse was feared by many attorneys to be a natural result of broadening the provisions in California. Their fears were proven to be valid, as some of the condemning agencies used the provisions as a means of forcing unfair settlements upon condemnees.[217] The agencies would simply demand that the owner accept their offer or else face dispossession by the condemnor. The threat of dispossession prior to judgment, which today would not necessarily strike fear in an owner's heart, was extremely powerful at that time, since, prior to 1957, California had no provision allowing the property owner to withdraw the deposit.[218] Therefore, if dispossession prior to judgment did occur, the owner not only lost his land, but he received no compensation until the court proceedings terminated.

The Mississippi provision allows the withdrawal of the deposit by the condemnee,[219] thereby reducing the opportunity for the administrative abuse described in the preceding paragraph. Even with the withdrawal provision, however, there is still room for administrative abuse in limited situations. The statute provides that when there are numerous interests in the property to be determined the court will determine those interests.[220] Where varied interests in the property are present the percentage of interests that each party holds may not be readily ascertained,[221] and the condemnor, if aware of such conditions,

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[215]Levin, *"Immediate Possession of Highway Right-Of-Way,"* Proceedings, A.A.S.H.O., 146-47 (1950), *cited in* GUY, *supra* note 32, at 58-59.

[216]Taylor, *supra* note 172, at 50.

[217]Letter from Leslie R. Tarr to the California Law Revision Commission, August 4, 1960, *cited* in Taylor, *supra* note 172, at 52 n.51.

[218]Taylor, *supra* note 172, at 50.

[219]MISS. CODE ANN. § 2749-04.5 (b) (Supp. 1972).

[220]*Id.*

[221]Taylor, *supra* note 172, at 103.

could conceivably use that condition to pressure the condemnees into an unfair settlement since the likelihood of prompt disbursement of the deposit would be nonexistent.

A second problem which arose in California, and which is likely to arise in Mississippi, is whether or not the condemnee is required to pay taxes and special assessments which accrued during the interval between the state's possession and the final judgment.[222] The California condemnees had to wait 22 years before the California courts would even hint that the condemnee was not liable for such expenses.[223] Hopefully the Mississippi condemnees will fare better at the hands of the Mississippi Supreme Court.

Other disadvantages of possession prior to judgment which pertain only to the condemnors are: (1) the commitment of the taking to that specific location, thereby removing the right to abandon; (2) the possible decrease in land value; (3) the accrual of a large amount of interest; and (4) the difficulty of determination of value, if determined at a time other than the date of possession, since construction may have already commenced (especially prejudicial when viewed by the jury).[224]

When viewed in full, the Mississippi provision for possession prior to judgment appears to provide for the condemnors' need of obtaining possession at an early date to enhance the commencement of construction at the earliest possible date; while at the same time the owner is given some financial reimbursement, although not the full compensation due him for the taking.

A unique proposal which would no doubt place property owners on a more equal footing with the condemnors would be to give the property owners a right to semi-immediate dispossession.[225] After a short period of time following the filing of the petition to condemn (say approximately 60 days), the owner of the condemned property could *require* the condemnor to take the property and deposit an estimate of value. The deposit would not draw interest since the condemnee would have forced the deposit. By taking such action, the condemnee would waive all objections to the taking, except a claim to greater compensation. Property owners who are able to locate replacement property would then be able to finance the purchase and be rid of their condemned property at a time more beneficial to them. Certain exceptions would be required, for example, if the taking were

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[222]*Id.* at 50.

[223]*See* Metropolitan Water Dist. of So. Cal. v. Adams, 16 Cal. 2d 676, 107 P.2d 618 (1940).

[224]Levin, *supra* note 115, *cited in* GUY, *supra* note 32, at 59.

[225]Taylor, *supra* note 172, at 92-94.

dependent upon the outcome of a future bond-issue election, or if the public funds were simply not available at that time. The only detrimental effect such a provision would have upon condemnors would be to remove their right to abandon the taking, since in most states the taking of possession precludes later abandonment.

Even though the above proposal was envisioned with another state in mind,[226] it would appear to be perfectly adaptable to the Mississippi statutory law, and if Mississippi incorporated such a provision in the near future, it could lead the other states into the next era of eminent domain law.

D. Is Mississippi's Possession Prior to Judgment Provision Unconstitutional?

As mentioned earlier, eminent domain is a sovereign right limited only by the state and federal constitutions.[227] One of those limitations is the Mississippi constitutional provision which requires the state to pay the property owner due compensation *before* taking the property under the power of eminent domain.[228] Mississippi has had four constitutions since it became a state and each has contained this provision.[229]

Prior to the emergence of the possession-prior-to-judgment provisions, the condemnors in the judicial-method states could not enter into possession until due compensation had been assessed and paid.[230] Once the possession-prior-to-judgment provisions began to appear, the state legislatures attempted to protect property owners by requiring the condemnor to deposit an approximate or estimated compensation prior to the condemnor's taking possession of the property.[231] Practically speaking, the deposit provides the owner with a form of security,[232] but is the deposit the due compensation required to be paid to the owner by the constitutions?

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[226]*Id.* at 92-99.

[227]Boom Co. v. Patterson, 98 U.S. 403, 406 (1878); State v. Woodham, 264 So. 2d 166, 171 (Ala. 1972); Steele v. County Comm'rs of Madison County, 83 Ala. 304, 3 So. 761, 762 (1888); Wise v. Yazoo City, 96 Miss. 507, 509, 51 So. 453, 455 (1910); Brown v. Beatty, 34 Miss. 227, 239 (1857); Havran, *supra* note 15, at 382; Lenhoff, *supra* note 14, at 599; Note, 4 GEO. WASH. L. REV. 130, 134 (1935).

[228]MISS. CONST. art. 3, § 17 ("Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law. . . .").

[229]MISS. CONST. art. 3, § 17 (1890); MISS. CONST. art. I, § 10 (1869); MISS. CONST. art. I, § 13 (1832); MISS. CONST. art. I, § 13 (1817).

[230]GUY, *supra* note 32, at 57.

[231]LEVEY, *supra* note 29, § 2.03[2], at 2-8.

[232]Taylor, *supra* note 172, at 48.

Three of the four constitutional provisions which Mississippi has had concerning the payment of due compensation *prior* to the taking, have on several occasions been construed by the Mississippi Supreme Court.[233] On each occasion the court has ruled that due compensation *must* be paid *before* the taking of the property.[234] While the Mississippi constitutional provision appears simple, it contains one phrase which the courts of all the states have been unable to interpret with any uniformity. That phrase is "due compensation." Although the judiciary has been entrusted with the duty of determining what "due compensation" entails,[235] some courts, including the Mississippi Supreme Court on at least one occasion,[236] have gone outside the parameter of interpreting the phrase and have seemingly removed the requirement that due compensation be paid prior to the taking of the property.

The Mississippi decision which probably has the most authoritative background[237] as to the interpretation of the due compensation clause is *Thompson v. The Grand Gulf Railroad & Banking Co.*[238] In its opinion the court stated that although the legislative acts should, if possible, be sustained, "the constitution *must* be preserved inviolate."[239] The court further stated:

> It is a sound rule in construing constitutions, that no word is to be rejected or disregarded which may have a material bearing on the rights of the citizen, and such construction should be given as will best protect private rights, because constitutions are limitations, which confine each department of the government to the exercise of such powers only as have been delegated. The word 'first,' used in the bill of rights, cannot be regarded as useless; nor are we at liberty to suppose that it

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[233]No judicial decisions appear which construe the provision contained in the 1817 constitution.

[234]*See, e.g.*, Levee Comm'rs v. Dancy, 65 Miss. 335, 3 So. 568 (1888); Thompson v. Grand Gulf R.R. & Banking Co., 4 Miss. (3 How.) 240 (1839). This is of course subject to the state's power to act as is necessary in emergency situations, *i.e.*, fire, flood, or war. Penrice v. Wallis, 37 Miss. 172, 183 (1859).

[235]Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893); Isom v. Mississippi Cent. R.R., 36 Miss. 300, 315 (1858); Stoebuck, *supra* note 15, at 575.

[236]Byrd v. Board of Supervisors of Jackson County, 179 Miss. 880, 176 So. 386 (1937).

[237]As Chief Justice Sharkey stated in the opinion:

> In support of this opinion, it may not be out of place to remark that one of the members of this court was also a member of the convention, and recollects that the above mentioned provision in the bill of rights was discussed, and it was framed as it is on due deliberation, and with a view to secure to individuals a previous indemnity for property taken.

Thompson v. Grand Gulf R.R. & Banking Co., 4 Miss. (3 How.) 240, 251 (1839).

[238]4 Miss. (3 How.) 240 (1839).

[239]*Id.* at 247.

> was inserted without design or by accident. . . . The power in a state to appropriate private property by virtue of its right of eminent domain, should be exercised only in the strictest justice towards the owner of the property.[240]

The court also said that merely substituting security for the compensation due, such as a bond or a judgment, is not the same as paying due compensation.[241] A judgment, although effective as a court order, is not a guarantee that payment will result, but is only a statement that payment is due.[242] The *Thompson* court concluded that the constitutional convention had not intended to include such substitutes within the meaning of the due compensation clause.[243]

Since the court was construing the constitution of 1832 in the *Thompson* decision, it is therefore necessary to determine whether or not the constitutional provision guaranteeing payment of due compensation before the property may be taken is still a viable constitutional guarantee. The constitution of 1869 only added one phrase to the compensation provision.[244] The phrase "in a manner provided by law," was attached to make certain that when compensation was due the proper manner of payment would be followed.[245] The Mississippi Supreme Court in *Pearson v. Johnson*,[246] interpreting the phrase, held that a property owner, who had been ejected from his land without regard for the statutory method of ejectment in condemnation proceedings, had been unconstitutionally deprived of his property, even though the compensation offered might have been the due compensation necessary for the taking of the land.[247] This decision not only declared the phrase "in a manner provided by law" a mere procedural guideline and not an additive to the determination of what constitutes "due compensation," but it also reiterated the earlier holding of the *Thompson* court that an "estimate" of what may be due compensation is not the equivalent of due compensation, and that therefore the payment of such an estimate of value cannot be substituted for the re-

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[240] *Id.* at 247-48.

[241] *Id.* at 248-49.

[242] *Id.* at 248.

[243] *Id.* at 249.

[244] MISS. CONST. art I, § 10 (1869) ("Private property shall not be taken for public use, except upon due compensation first being made to the owner or owners thereof, in a manner to be provided for by law."); MISS. CONST. art I, § 13 (1832) (". . . ; nor shall any person's property be taken or applied to public use without the consent of the legislature, and without just compensation being first made therefor.").

[245] Pearson v. Johnson, 54 Miss. 259, 262-63 (1876).

[246] *Id.*

[247] *Id.*

quired payment of due compensation.[248] Just 12 years later, and only 2 years prior to the adoption of the present state constitution, the Mississippi Supreme Court held that without due compensation being made *first,* the state cannot appropriate private property for a public use.[249]

When the presently effective state constitution, the constitution of 1890, was created, the due compensation provision received another attachment. The words "or damaging" were added to the provision.[250] As can be noted from a quick reading of the entire provision, the words "or damaging" simply amplified the already existing constitutional limitations placed upon the state's right to acquire private property by eminent domain.

Since the two additions to the "due compensation" provision have not had any effect upon the requirement that due compensation be paid before the state may take the property, it is obvious that the constitutional requirement for due compensation has undergone no variation since the *Thompson* court first interpreted it.

In 1911 the Mississippi Supreme Court continued its long line of decisions which have protected the property rights of individuals from state acquisition by ruling that state public policy cannot be allowed to override the positive guaranties of the constitution.[251] A court decision in 1923, if not viewed with a careful eye, could easily mislead someone into the belief that in order to take certain liberties with private property, all that need be done is assign the constitutional provision another interpretation.[252] The court held that if a conflict exists between a state statute and a state constitutional provision, and two interpretations of the constitutional provision are possible, then the interpretation most favorable to the legislation shall be used.[253] Although it is admitted that the court's statement is valid, the statement actually has no application to the due compensation provision, since that provision is not subject to a second interpretation. Therefore, any conflict which arises between a state statute and the constitutional provision must result in the destruction of the state statute.

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[248]*Id.*

[249]Levee Comm'rs v. Dancy, 65 Miss. 335, 3 So. 568 (1888).

[250]MISS. CONST. art. 3, § 17 (1890) ("Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law . . ."); MISS. CONST. art. I, § 10 (1869) ("Private property shall not be taken for public use, except upon due compensation first being made to the owner or owners thereof, in a manner to be provided for by law.").

[251]Hill v. Woodward, 100 Miss. 879, 880, 57 So. 294, 295 (1911).

[252]Hinds County v. Johnson, 131 Miss. 591, 592, 98 So. 95, 96 (1923).

[253]*Id.*

As the court stated in *Thompson,* when construing the constitution, no word can be rejected or disregarded if it has a material bearing upon citizens' rights, and the construction which will best protect those private rights must be used. The words "first made" contained in the due compensation provision are within that category of citizens' rights and thus cannot be overlooked by the court. Since the basic premise of a constitution is to *limit* the state by granting only such powers as the people wish to grant, the constitution should not be considered to be an open door to constructive aid in order to make unconstitutional statutes constitutional.

The only Mississippi decision which appears to be in conflict with the foregoing line of decisions is *Byrd v. Board of Supervisors of Jackson County,* wherein the court correctly held that due compensation must be paid prior to the taking of property, but misconstrued the qualities that constitute due compensation.[254] The court stated that the requirement of due compensation is satisfied by pledging the public faith and credit.[255] But, as was explained in the *Thompson* decision, even a judgment is not adequate security for replacing actual compensation, so how can any other public pledge suffice!

The Mississippi legislature in the provision for possession prior to judgment essentially admits that due compensation will not be paid prior to the taking because, even if we hypothetically assume that the estimated value rendered by the court-appointed appraiser was the correct due compensation for the taking, the condemnor is only required to deposit 85 percent of the estimated value.[256] There is no logical way that a percentage of the value estimated to be the due compensation can be construed to fulfill the requirement that the owner be paid due compensation prior to the taking.

In summation, until the actual payment assessed by the court proceedings has been paid to the property owner, there has been no payment of the due compensation required by the constitution and certainly the requirement of the payment being "first made" has not been satisfied by a deposit of a percentage of the estimated value of the property. Until those conditions have been met, the state has absolutely no power to take private property from any person for any public use.

Mississippi has not been alone in providing such constitutional restraints upon state acquisitions through eminent domain proceedings. California, which had a provision identical in content to the Mississippi

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254 179 Miss. 880, 881, 176 So. 386, 387 (1937).

255 *Id.*

256 Miss. Code Ann. § 2749-04.5 (b) (Supp. 1972).

provision,[257] approached the possession-prior-to-judgment proceedings in a different manner. Instead of enacting a statutory procedure, the California state constitution was amended to allow possession-prior-to-judgment procedures.[258] The requirement of paying due compensation *first* was thereby circumvented.

Few persons familiar with the needs of today's society, would deny that the public needs a procedure for taking property at the earliest possible time. Possession of property prior to judgment is undoubtedly a necessity for the future development of our state, but if Mississippi wishes to have a procedure for taking possession prior to judgment that does not violate its constitution, then the people of Mississippi should be made aware of that need. The state constitution could then be amended to provide for such exceptional takings of private property, rather than such takings being had through the means of an unconstitutional statute. The following statement may be simple and idealistic, but no one can deny its validity. The people of a state may not always make the necessary changes in their constitution that some would like for them to make; but when a change in the constitution is necessary, it is always the people of the state who must make the change.

Other state supreme courts have recently faced the same constitutional controversy with the same tools and have placed the rights of the people of their state, as protected by their state constitution, above the reach of such unconstitutional infringements of private property rights.[259] The Louisiana Supreme Court in 1963 used a two-pronged attack in holding that state's provision for possession-prior-to-judgment unconstitutional. The court stated that not only is the state powerless to take private property until compensation has been paid,[260] but also that an estimation of the value of the property violates the owner's constitutional right to be heard in the determination of due compensation. The Ohio Supreme Court in 1969 held that the state's provision was unconstitutional on the ground that an estimation of the value of the property was not equivalent to the compensation required by their state constitution in article I, section 19, and that the

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257CAL. CONST. art. I, § 14 ("Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, . . .").

258Taylor, *supra* note 172, at 38.

259State v. Phares, 245 La. 534, 159 So. 2d 144 (1963); City of Worthington v. Carskadon, 18 Ohio St. 2d 222, 249 N.E.2d 38 (1969).

260State v. Phares, 245 La. 534, 159 So. 2d 144, 147 (1963). *See also* LA. CONST. art. I, § 2 (". . . private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid").

only way to determine the compensation due under the constitution was by an actual assessment in the condemnation trial proceedings.[261]

As witnessed by the foregoing state court decisions, it would not be a radical step for the Mississippi Supreme Court to rule that the Mississippi provision for the possession of property prior to judgment is unconstitutional. The Mississippi court, almost since its creation, has, without exception, held that due compensation must be paid prior to taking of private property by the state for public use. The estimated value of the property deposited into court by the condemnor in Mississippi is not due compensation, as even the statutory language admits; and therefore, the statutory procedure has not adhered to the commandments of the Mississippi constitution. The only true remedy the people of Mississippi have is controlled by the Mississippi Supreme Court. The court must, at its first opportunity, strike down this overt infringement upon the constitutional rights of the people in Mississippi.

IV. Federal Effect on Eminent Domain in Mississippi

A. Background

The judiciary has traditionally been reluctant to include damages which arise out of eminent domain proceedings in the compensation which is to be paid for the property taken.[262] There have been two often-expressed theories to base such reluctance upon: (1) the "payment of property" approach; and (2) the "equal risk" approach.[263]

The "payment of property" approach was established in *Monongahela Navigation Co. v. United States*[264] when the United States Supreme Court stated that the fifth amendment does not compel the payment of compensation for expenses or losses incurred by owners which are only incidental to or which result from the condemnation, unless such losses are reflected in the market value of the land.

The "equal risk" approach means that since owners share equally the risk that at some point in time their own land may be condemned, the pendency of eminent domain proceedings merely places that individual owner in a position which differs only in degree, and therefore any losses incurred are simply viewed as a cost of ownership and are not compensable.[265]

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[261]City of Worthington v. Carskadon, 18 Ohio St. 2d. 222, 249 N.E.2d 38, 39 (1969).

[262]3 P. Rohan & M. Reskin, *supra* note 173, § 14.02[2], at 14-12 (1972).

[263]*Id.*

[264]148 U.S. 312, 343 (1893).

[265]3 P. Rohan & M. Reskin, *supra* note 173, § 14.02[2], at 14-12 (1972).

Since the judiciary has determined that due compensation clauses do not embody other losses, as mentioned above, the only apparent means for obtaining relief is through legislation.[266] The Supreme Court has held that Congress is authorized to make payments for such losses, but indicated that such payments are to be considered as an addition to and not a part of the due compensation to which property owners are entitled.[267]

B. The Need for Legislation

Admitedly, the government has the power to take a person's land, but should that person be left alone to carry the burden of the costs resulting from such takings, *i.e.*, relocation of family and business.[268] Such displacements not only affect the tangible possessions of the owner, but also his emotional and physical well-being through lower quality housing or a decrease in his monetary security.[269] Psychological consequences are also enveloped in the dispossession of one's property since the loss of one's home, neighborhood, friends, and sometimes even the community,[270] also attends such dispossession.

Relocation involves a multitude of costs such as transportation expenses, brokers' fees, lost time searching for housing, appraisal and legal fees in obtaining a replacement home, utility deposits, and acquisition of furnishings.[271] The most expensive of these costs is the cost of transporting the owner's personal property to the new house.[272] Such transportation costs include the loss of abandoned property, fees for dismantling fixtures, loss caused by breakage, possible mortgage prepayment penalties, and transfer fees, *i.e.*, recording and tax assessment fees.[273] Each year approximately 106,000 families and individuals are displaced and forced to relocate by the acquisition of their property through federally financed and locally administered programs.[274] While urban renewal programs account for only about one-third of all governmental displacements,[275] it has been estimated that no less than four

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[266]Note, *The Interest in Rootedness: Family Relocation and an Approach to Full Indemnity*, 21 STAN. L. REV. 801, 819 (1969).

[267]Mitchell v. United States, 267 U.S. 341, 345 (1924).

[268]Note, *Eminent Domain*, 2 ST. MARY'S L.J. 151, 155 (1970).

[269]Note, *supra* note 266, at 807.

[270]*Id.* at 813.

[271]*Id.* at 807-08.

[272]*Id.*

[273]*Id.*

[274]*Id.* at 825.

[275]*Id.* at 802 n.9, *citing* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RELOCATION: UNEQUAL TREATMENT OF PEOPLE AND BUSINESSES DISPLACED BY GOVERNMENTS 12 (1965).

million persons were displaced by urban renewal programs from 1949 to 1972.[276]

C. *Federal Legislation*

Prior to 1970, the federal government began to recognize the need for governmental assistance to owners who were victims of eminent domain takings. The 1962 Federal-Aid Highway Act provided a program of limited relocation assistance. The Act made relocation assistance mandatory when owners or tenants were forced to vacate their residences, but made such assistance optional to business establishments.[277] In 1968 Congress acted again, through the 1968 Federal-Aid Highway Act which considerably upgraded the 1962 Act, and provided for the compensation of highway displacees of all kinds.[278] Finally, in 1970, the present federal act relating to such losses, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, was enacted.[279] This Act provides the means to facilitate the owner's move, minimizes the hardship, and aids in improving the living conditions of the displacee.[280]

D. *State Legislation*

What appears to have been Mississippi's first attempt to provide aid to the victims of eminent domain takings, other than due compensation, was the Mississippi "Urban Renewal Law" of 1958.[281] The Act granted to *municipalities* the power to

> prepare plans for the relocation of persons (including families, business concerns and others) displaced by an urban renewal project, and to make relocation payments to or with respect to such persons for moving expenses and losses of property for which reimbursement or compensation is not otherwise made, including the making of such payments financed by the federal government; . . .[282]

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[276]Note, *supra* note 266, at 802 n.8, *citing* M. ANDERSON, THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL 1949-1962, at 54-55 (1964).

[277]Address by David R. Levin, Southwestern Legal Foundation, Oct. 21, 22, 1971, in PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 95 (1972).

[278]*Id.* at 97.

[279]*Id.* at 98.

[280]1972 SECRETARY OF THE DEP'T OF TRANSP. ANN. REP. *contained* in ABA COMMITTEE ON CONDEMNATION AND CONDEMNATION PROCEDURE, *supra* note 21, Pt. II, at 224.

[281]MISS. CODE ANN. §§ 7342-01 to -20 (Supp. 1972).

[282]*Id.* § 7342-07 (g).

The Urban Renewal Law is still effective[283] and is not controlled by any other state eminent domain law.[284]

In 1970 Mississippi's first comprehensive relocation assistance program became effective. This program was the state counterpart to the 1968 federal legislation,[285] and has since been replaced by the latest relocation assistance program which became effective on July 1, 1972. The new state acts are a direct result of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970,[286] but any dealings, negotiations, or actions commenced prior to the effective date should still be handled under the 1970 Mississippi statutes.[287]

E. State Compliance with Federal Legislation

No state is required by federal law to follow the federal legislation with regard to relocation assistance; however, any state which does not comply will be ineligible to receive federal aid or assistance for projects which would cause displacement or which would require the acquisition of real property.[288] In order to comply the states must assure the federal agency that:

> (1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under sections 202, 203 and 204. . .;
>
> (2) relocation assistance programs offering the services described in section 205 shall be provided to such displaced persons;
>
> (3) within a reasonable period of time prior to displacement, decent, safe, and sanitary replacement dwellings will be available to displaced persons in accordance with section 205(c)(3);[289]

and that:

> (1) in acquiring real property it [the state] will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 301 and the provisions of section 302, and

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[283] *Id.* §§ 7342-01 to -20.

[284] *Id.* § 7342-08 (Supp. 1972).

[285] 1968 Federal-Aid Highway Act, 23 U.S.C. § 101 (1970); MISS. CODE ANN. §§ 8023.5-01 to -11 (Supp. 1972).

[286] MISS. CODE ANN. §§ 2749-51 to -85 (Supp. 1972).

[287] *Id.* § 8023.5-01 (Editor's Note).

[288] Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Act of January 2, 1971, Pub. L. No. 91-646, §§ 210, 305, 84 Stat. 1894, 1899, 1906. [hereinafter cited as Uniform Relocation Act 1970].

[289] Uniform Relocation Act 1970, Title II § 210.

(2) property owners will be paid or reimbursed for necessary expenses as specified in sections 303 and 304.[290]

All states were required to comply no later than July 1, 1972,[291] or else lose the above mentioned federal aid and assistance. Mississippi complied by enacting two acts—the "Real Property Acquisition Policies Act"[292] and the "Relocation Assistance Act."[293] Most states which complied with the federal act simply reiterated what the federal legislation had stated, but others such as California made the relocation assistance program even broader by applying the program to all eminent domain takings in the state.[294]

F. Comparison of Federal and State Legislation[295]

Since the Mississippi and federal acts are, with few exceptions, identical, the following discussion of the acts shall simply cite to the state and federal acts without further comparison, unless the acts differ in some material manner, in which case the contrasting features will be pointed out in the text of the discussion.

Any person or agency which acquires real property for use in a federal aid or assistance project must, as soon as practicable after the payment date or the date of deposit of the funds into court, reimburse the owner for expenses incidental to the conveyance *(i.e.,* recording fees, mortgage prepayment penalty costs, and a pro rata share of the real property taxes).[296] If the state institutes an eminent domain proceeding but is later adjudged not to have the power to take the property or if the suit is abandoned, the property owner must be reimbursed for his reasonable attorney, appraisal, and engineering fees.[297] The same expenses must be reimbursed after an inverse taking when a property owner institutes an inverse condemnation suit and is awarded compensation or reaches a settlement with the state.[298]

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[290]*Id.* Title III § 305.

[291]*Id.* Title II § 221 (b).

[292]Miss. Code Ann. §§ 2749-51 to -58 (Supp. 1972).

[293]*Id.* §§ 2749-71 to -85 (Supp. 1972).

[294]Comment, *Relocation Assistance in California: Legislative Response to the Federal Program,* 3 Pacific L.J. 114, 116 (1972).

[295]Various provisions of the acts are not included simply because they are merely the mundane inclusions of every act.

[296]Uniform Relocation Act 1970, Title III § 303; Miss. Code Ann. § 2749-52 (Supp. 1972).

[297]Uniform Relocation Act 1970, Title III §§ 304 (a), (b); Miss. Code Ann. § 2749-53 (Supp. 1972).

[298]Uniform Relocation Act 1970, Title III § 304 (c); Miss. Code Ann. § 2749-54 (Supp. 1972).

Buildings and other improvements located on the land taken shall be acquired, and when determining the compensation due, the structures should be deemed to be part of the real property, without regard to any rights or obligations of a tenant.[299] A tenant who is entitled to payment for the improvement shall be paid the fair market value which the structure contributes to the fair market value of the real property, or the fair market value for removal, whichever is greater.[300] To prevent duplication of payments, the landowner must disclaim all interests in the building and the tenant must assign, transfer, and release all rights, title, and interest in the building; however, in no way will the tenant be deprived of his right to reject such payment and to obtain payment under other state laws.[301]

Although the federal act does not require adherence to the policies listed below, but only suggests the policies as a guideline, the state act would appear to make the use of the policies mandatory.[302] The policies are that the condemnors should: (1) make reasonable efforts to negotiate for the acquisition; (2) make an appraisal before the negotiations begin; (3) present a written statement to the owner of what is considered to be the just compensation for the property and the amount of damages to the property, including a summary of the basis for that determination, and offer the landowner that amount; (4) not require anyone to surrender property until the purchase price is paid or deposited with the state court, and the amount must be no less than the appraisal value or a court award; (5) to the greatest extent practicable, give 90 days' notice before the date to vacate the property (assuming a replacement dwelling is available); (6) if an owner remains on the property in a rental status, charge a rental value not to exceed the fair rental value for a short-term occupier; (7) take no coercive action to compel agreement upon the offered price *(i.e.,* deferring owner's possession of deposit, or advancement of the time of condemnation); (8) institute formal condemnation proceedings, rather than forcing the owner to institute inverse condemnation action; and (9) offer to buy any uneconomic remnant left after the taking.[303]

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[299]Uniform Relocation Act 1970, Title III § 302; MISS. CODE ANN. § 2749-56 (Supp. 1972).

[300]Uniform Relocation Act 1970, Title III § 302 (b); MISS. CODE ANN. § 2749-56 (b) (Supp. 1972).

[301]Uniform Relocation Act 1970, Title III § 302 (b); MISS. CODE ANN. § 2749-56 (b) (Supp. 1972).

[302]MISS. CODE ANN. § 2749-55 (Supp. 1972) (Any person . . . shall comply with the following policies: . . .").

[303]Uniform Relocation Act 1970, Title III § 301; MISS. CODE ANN. § 2749-55 (Supp. 1972).

Even though the federal act provides that the policy provisions would "create no rights or liabilities" and that the provisions would "not affect the validity of any property acquisitions by purchase or condemnation,"[304] Mississippi has not adopted such a limitation, but instead has made the use of the policies mandatory.[305] The assumption from that legislative inaction is that such policy considerations are to be considered to be rights belonging to the owners of land in Mississippi that is taken in connection with any federally aided or assisted program.

Aside from the provisions made for payments to the owner for the direct effect of the taking of his property, the acts also encompass expenses incurred indirectly. The purpose of the relocation assistance acts is to provide a uniform policy for the fair and equitable treatment of displaced persons[306] in regard to relocation payments, advisory assistance, and the assurance that standard housing will be available.[307]

The relocation acts contain definitions of key words, such as "agency," "person," "business," "farm operation," and "displaced person."[308] The definition of "displaced person" is by far the most important, since unless the person or agency requesting relocation assistance qualifies as a "displaced person" no assistance can usually be given. The Mississippi act extends the definition to include "[any] person who moves or discontinues his business or moves other personal property, or moves from his dwelling . . . as the direct result of building code enforcement activities or a program of rehabilitation of buildings conducted pursuant to a governmental program. . . ."[309] The additional provision appears to overlap the various state urban renewal programs[310] and is probably meant to insure the availability of relocation assistance in such programs.

The federal act includes a definition of "mortgage,"[311] but the Mississippi Legislature for no apparent reason, has deleted that definition which did in fact appear in the earlier 1970 state legislation.[312]

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[304]Uniform Relocation Act 1970, Title I § 102 (a).

[305]Miss. Code Ann. § 2749-55 (Supp. 1972).

[306]Uniform Relocation Act 1970, Title II § 201; Miss. Code Ann. § 2749-71 (Supp. 1972).

[307]Uniform Relocation Act 1970, Title II § 210; Miss. Code Ann. § 2749-71 (Supp. 1972).

[308]Uniform Relocation Act 1970, Title I § 101; Miss. Code Ann. § 2749-72 (Supp. 1972).

[309]Miss. Code Ann. § 2749-72 (Supp. 1972).

[310]*See generally id.* §§ 7342-07, -08.

[311]Uniform Relocation Act 1970, Title I § 101 (9).

[312]Miss. Code Ann. § 8023.5-01 (6) (Supp. 1972).

Relocation payments are made to displaced persons for the actual and reasonable moving expenses, the actual direct losses of personal property resulting from the move, and the actual and reasonable expenses incurred in searching for a replacement business or farm.[313] Any person displaced from a dwelling, in lieu of the payment just described, may choose to receive a moving expense allowance, not to exceed $300, and a dislocation allowance of $200.[314]

Any person displaced from his business or farm operation may, in lieu of the payment first mentioned in the preceding paragraph, receive a fixed payment equal to the average annual net earnings of the business or farm operation,[315] except the payment must be at least $2,500 but not in excess of $10,000.[316] No payment can be made to a business, however, under the last provision, unless the business cannot be relocated without a substantial loss of its existing patronage. Also it must not be a "part of a commercial enterprise having at least one . . . other establishment not being acquired by the agency, which is engaged in the same or similar business."[317]

In addition to other payments received, any person displaced from a dwelling, which he has owned and occupied for not less than 180 days prior to the negotiations, shall receive payment for: (1) the amount "which when added to the acquisition cost . . . , equals the reasonable cost of a comparable . . . dwelling, which is . . . accessible to public services and . . . employment; (2) the amount . . . [to cover] increased interest costs for a [subsequent financial agreement for the replacement dwelling]; and (3) [the amount of] reasonable expenses incurred . . . [for title searches], recording fees, and other closing costs . . . , but not prepaid expenses."[318] Such payment, however, can-

[313]Uniform Relocation Act 1970, Title II § 202 (a); MISS. CODE ANN. § 2749-73 (a) (Supp. 1972).

[314]Uniform Relocation Act 1970, Title II § 202 (b); MISS. CODE ANN. § 2749-73 (b) (Supp. 1972).

[315]MISS. CODE ANN. § 2749-73 (c) (Supp. 1972):

> . . . the term 'average annual net earnings' means one-half . . . of any net earnings of the business or farm operation before federal, state and local income taxes during the two . . . taxable years . . . preceding the taxable year in which the business or farm operation moves from the real property acquired for such project, or during such other period as the agency determines to be . . . equitable for establishing such earnings, and includes any compensation paid by the business or farm operation to the owner, his spouse, or his dependants during such period.

[316]Uniform Relocation Act 1970, Title II § 202 (c); MISS. CODE ANN. § 2749-73 (c) (Supp. 1972).

[317]Uniform Relocation Act 1970, Title II § 202 (c); MISS. CODE ANN. § 2749-73 (c) (Supp. 1972).

[318]Uniform Relocation Act 1970, Title II § 203; MISS. CODE ANN. § 2749-74 (Supp. 1972).

not exceed $15,000 and is payable only if the displaced person purchases and occupies a replacement dwelling within 1 year of the date that he is compensated or the date on which he vacates, whichever is later.[319]

Tenants may also receive additional payments, if they have occupied the dwelling for at least 90 days prior to negotiations.[320] The amount of the payment shall be that necessary to enable the displaced person to lease or rent, for not more than 4 years, a comparable dwelling, but the payment shall not exceed $4,000.[321] In lieu of that payment the tenant may receive the amount necessary to make a down payment on the purchase of a comparable dwelling (including incidental expenses such as closing costs), but the payment may not exceed $4,000 and any amount in excess of $2,000 must be matched by the person buying the dwelling.[322]

All displaced persons are to be provided access to a relocation assistance advisory program,[323] and any person immediately adjacent to the acquired property who suffers substantial economic injury because of the acquisition may be given such advisory services.[324] The advisory program includes aid for the purposes of: (1) determining the need for such assistance; (2) assisting the owners of businesses and farm operations to establish in suitable locations; (3) supplying information of all other assistance programs; (4) assisting the owner in minimizing the hardships of relocation; (5) securing coordination of related activities; and (6) assuring the availability of suitable dwellings as replacements.[325] Although the federal act also requires that information concerning current prices, availability, and rental information be provided,[326] the state has not included such a provision. This type of provision would be of immeasureable aid to displacees and would con-

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[319]Uniform Relocation Act 1970, Title II § 203; MISS. CODE ANN. § 2749-74 (Supp. 1972).

[320]Uniform Relocation Act 1970, Title II § 204; MISS. CODE ANN. § 2749-75 (Supp. 1972).

[321]Uniform Relocation Act 1970, Title II § 204; MISS. CODE ANN. § 2749-75 (Supp. 1972).

[322]Uniform Relocation Act 1970, Title II § 204; MISS. CODE ANN. § 2749-75 (Supp. 1972).

[323]Uniform Relocation Act 1970, Title II § 205; MISS. CODE ANN. § 2749-76 (Supp. 1972).

[324]Uniform Relocation Act 1970, Title II § 205; MISS. CODE ANN. § 2749-76 (Supp. 1972).

[325]Uniform Relocation Act 1970, Title II § 205; MISS. CODE ANN. §§ 2749-76, -77 (Supp. 1972).

[326]Uniform Relocation Act 1970, Title II § 205.

tain information that only the state has the capability of collecting and updating.

The administrative head of each agency involved—state, local, and federal—shall adopt regulations to assure that: (1) the payments and assistance will be administered fairly, reasonably and uniformly; (2) prompt payment or in some cases even an advance payment shall be made; and (3) any grievances may be reviewed by the administrative head of the agency.[327]

To prevent unnecessary expense all agencies may cooperate with the other agencies and contract for services from outside sources.[328] Any person aggrieved by a final administrative determination concerning eligibility for relocation payment is, *under state law only*,[329] entitled to an appeal to the eminent domain court. The appeal must be taken within 20 days of the notice of the person's ineligibility.[330]

Nothing in the acts is to "be construed as creating in any condemnation proceedings brought under the power of eminent domain any element of *value or damages* not in existence immediately prior to the date of the enactment of this act. . . ."[331] The payments are to be additives to, and not a part of the due compensation that is otherwise provided. Also, the state acts cited in the entire comparison of federal and state statutes discussed above are limited in application to projects or programs involving federal funds, in whole or in part,[332] and any relocation payments received are not to be considered to be income for any purpose.[333]

G. *Mississippi Case Law Related to Relocation Costs*

Few cases have spoken to relocation costs in Mississippi, but there have been some important basic rules announced by the Mississippi Supreme Court. The court, in 1972, held that the legislative intent of the 1970 Mississippi relocation act was to "provide compensation for items not previously provable or recoverable as damages in an eminent domain proceeding."[334] The court was construing the relocation act

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[327]*Id.* § 213; MISS. CODE ANN. § 2749-78 (Supp. 1972).

[328]Uniform Relocation Act 1970, Title II § 212; MISS. CODE ANN. § 2749-79 (Supp. 1972).

[329]MISS. CODE ANN. § 2749-82 (Supp. 1972).

[330]*Id.*

[331]Uniform Relocation Act 1970, Title I § 102 (b); MISS. CODE ANN. §§ 2749-57, -83 (Supp. 1972).

[332]MISS. CODE ANN. §§ 2749-51, -71 (Supp. 1972).

[333]Uniform Relocation Act 1970, Title II § 216; MISS. CODE ANN. § 2749-81 (Supp. 1972).

[334]Mississippi State Highway Comm'n v. Rives, 271 So. 2d 725, 728 (Miss. 1972).

which preceded the present relocation act of 1972, but there is no reason to believe that a different view of the legislative intent would be taken by the court in viewing the present act.

Prior to the existence of any relocation assistance in Mississippi, the court allowed recovery of what is sometimes considered to be relocation assistance by holding that when such costs can be considered as part of due compensation as a result of the before and after rule, the costs are recoverable.[335]

H. Purpose and Effect

The purpose of the relocation assistance acts has been to "raise the level of relocation assistance . . . and to render such relocation assistance uniform for all persons who are displaced by federal and federally assisted programs."[336] Although the acts could greatly affect land acquisition,[337] by relieving some of the burden carried by the victimized landowner,[338] there must be vigorous action at the administrative level before the acts can have any real effect of a high quality.[339]

Conclusion

Since case law and statutory law has more or less stacked up through the years, little uniformity exists in eminent domain law.[340] Mississippi, through its newly revised statutory law, has done much to bring uniformity to the continuing struggle between the public need for private land and the private need for compensation for the taking of that land. Even so, there are areas of the law which could be filled either by the creation of more statutory coverage or by broad interpretations of the existing statutory law by the Mississippi Supreme Court. Since the court has been vested with the ultimate power of determining what constitutes "due compensation,"[341] the thorny problem of just how far that phrase should be extended rests with the court.

335Mississippi State Highway Comm'n v. McArn, 246 So. 2d 512, 514 (Miss. 1971); Mississippi State Highway Comm'n v. Rogers, 242 Miss. 439, 136 So. 2d 216, 218 (1961), holding that a required removal of cars by the owner before vacating was to be reflected in the before and after valuation and is therefore part of the market value which will bring it within the realm of recovery.

336ABA Committee On Condemnation and Condemnation Procedure, *supra* note 21, at 272, *citing* Research Results Digest, Digest 32-June 1971, National Cooperative Highway Research Program.

337Address by David R. Levin, *supra* note 277.

3383 P. Rohan & M. Reskin, *supra* note 173, § 6.05, at 6-33.

339*Id.* § 2.03[2], at 2-9 & § 6.05, at 6-33.

340McNally & Bermant, *supra* note 125.

341Monongahela Navigation Co. v. United States, 148 U.S. 312, 343 (1893); Wilcox, *Eminent Domain*, 5 Am. Bus. L.J. 143, 145 (1967).

Most courts have limited due compensation to the "fair market value" of the property taken; however, this is not now a satisfactory measurement.[342] When the general rules, excluding the payment of incidental and moving expenses, were first established, the United States was a rural nation and property taken seldom reached into the property owners' homes and businesses.[343]

It is now appropriate to recall the question posed at the beginning of this writing: Is the compensation paid for the property owner's loss *(i.e.,* the taking of the land), or is compensation paid for the public's gain *(i.e.,* the land taken)? The courts should answer that question in favor of the owner's loss. The procedures utilized over a century ago to determine compensation when virgin land was the property involved[344] should now be replaced by a procedure within which the present generation of private property owners can survive. If the public cannot afford to compensate the owner for the property, then the property should not be taken.[345] It is time that the due process guaranteed to private property owners is recognized as including an owner's right to reimbursement for the expenses forced upon him by the state's taking of property *(e.g.,* moving expenses, attorneys' fees, expert witnesses and appraisal fees). Otherwise, the owners are given the choice of either accepting a low value offered prior to the hearing or of waiting until after the hearing and recovering a low value as a result of deducting the fees and expenses incurred from the compensation awarded. The courts should revise the meaning of "compensation" and construe the term to mean "the owner's loss." A practical solution regarding court related expenses would be to allow the owner his reasonable expenses if the court proceedings determine that the amount originally offered by the state was not due compensation, but should the proceeding show a reverse finding, then the owner would be denied payment of the expenses.[346]

When determining which road to follow, "the owner's loss" or "the public's gain", the courts would do well to keep the following statement in mind:

> It must be remembered that the condemnee in an eminent domain proceeding is the only litigant in our courts who is

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[342]Bigham, *supra* note 91, at 90.

[343]Comment, *Compensation for Moving Expenses of Personal Property in Eminent Domain Proceedings,* 20 HASTINGS L.J. 749, 750 (1969).

[344]*Id.* at 751

[345]Bigham, *supra* note 91, at 91.

[346]Comment, *Attorneys' Fees in Condemnation Proceedings,* 20 HASTINGS L.J. 694, 713 (1969).

not there through some act, omission or transaction of his own. Such a claimant is not a party to any contract, the performance or nonperformance of which is being litigated. He is not charged with violation of any criminal statutes. He is not charged with negligence; nor is he seeking recovery for damages resulting from another's negligence. In fact, in a vast majority of condemnation cases, he wishes to retain ownership of the property about to be appropriated. Much too often he receives unjust compensation.[347]

Johnnie M. Haley

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[347]McNally & Bermant, *supra* note 125, at 287.

FEDERAL TAX ASPECTS OF DIVORCE AND SEPARATION

I. Introduction

The number of divorces in the United States has increased over the past decade,[1] and one might say that the intricacies of the federal tax laws concerning divorce and separation have increased accordingly. Today an attorney representing a client in a divorce case must not only be familiar with the law of domestic relations, but he must also know the tax laws and their effect upon divorce and separation. These laws are so interrelated that the proper tax result cannot be achieved without knowledge of the law concerning all areas of divorce and separation.

This comment will discuss the effect of federal income, estate, and gift tax upon a divorce or separation,[2] and is designed to give the non-tax lawyer a working knowledge of the tax aspects of a divorce or separation.[3]

II. History

Under the Income Tax Act of 1913, payments to a divorced wife under a court decree were not taxable to the wife.[4] Furthermore there was no authorization for the payments to be deducted by the husband. Even income distributed under an alimony trust was held to be taxable to the husband, unless the local law completely discharged the husband's obligation.[5] In 1942, Congress added section 22(k) to the Internal Revenue Code of 1939[6] to relieve the heavy tax burden placed upon divorced husbands. The enactment of this section permitted a husband to deduct alimony payments from his gross income, and required such payments to be included in the wife's income.[7] The husband's obligation to make these payments had to be imposed under a decree of divorce or separation, or under a written instrument incident to such a decree.[8] This section was strictly interpreted, and where the

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[1] *See* U.S. Dep't of Commerce, Bureau of the Census, Statistical Abstract of the United States 60 (1971).

[2] The state income tax results will not be covered. In Mississippi, alimony payments are not deductible by the husband nor taxable to the wife. Miss. Code Ann. § 9220-10 (1956); Miss. Code Ann. § 27-7-19 (1972).

[3] For the purposes of this paper, it will be assumed that the husband makes the payments, and the wife receives the payments.

[4] Gould v. Gould, 245 U.S. 151 (1971).

[5] Helvering v. Leonard, 310 U.S. 80 (1940); Helvering v. Fitch, 309 U.S. 149 (1940).

[6] Revenue Act of 1942, ch. 619, § 120, 56 Stat. 816.

[7] *See* Commissioner v. Walsh, 183 F.2d 803 (D.C. Cir. 1950).

[8] Terrell v. Commissioner, 179 F.2d 838 (7th Cir. 1950), *cert. denied*, 340 U.S. 822 (1950).

husband made payments to his wife under only a written separation agreement, the deduction by the husband was disallowed.[9]

Although this change in the tax law was a welcome relief to divorced husbands, the ex-wives felt that having to pay income tax on alimony payments received by them was unjust. As a result the constitutionality of section 22(k) was challenged, but the court upheld the provision stating that taxing the wife on alimony payments received from her former husband did not deprive her of property without due process of law.[10]

III. Present Law

In 1954 Congress enacted the Internal Revenue Code of 1954,[11] replacing section 22 (k) of the 1939 Code with section 71 of the Code of 1954. Under section 71, the wife is required to include alimony payments in her income, and the husband is permitted to deduct amounts paid for alimony from his gross income.[12] The purpose of the revisions found in section 71 was to provide for a more uniform tax treatment of similar situations arising in different states.[13]

As provided in section 71, the following types of payments are included in the wife's gross income and are deductible by the husband: (1) periodic payments made under a decree of divorce or separate maintenance, or under a written instrument incident to such a decree; (2) periodic payments made pursuant to a written separation agreement; or (3) periodic payments made under a decree for support.

A. Decree of Divorce or Separate Maintenance

When there has been a court decree of divorce or separate maintenance, section 71 (a) (1) is applicable. Payments made by the husband pursuant to such a decree are taxable to the wife under section 71 and are deductible by the husband under section 215.[14] Similarly, if an obligation to make payments to the wife is imposed pursuant to a written instrument incident to the decree, the tax result will be the same.

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[9]Cooper v. Cooper, 35 A.2d 921 (D.C. Mun. App. 1944).

[10]Neeman v. Commissioner, 255 F.2d 841 (2d Cir. 1958), *cert. denied*, 358 U.S. 841 (1958).

[11]Pub. L. No. 83-591, ch. 736, 68A Stat. 19. Code references hereinafter are to the Int. Rev. Code of 1954, unless otherwise specified.

[12]*See* Turpin v. United States, 240 F. Supp. 171 (W.D. Mo. 1965). Int. Rev. Code of 1954, § 215 allows husband to deduct the payments.

[13]Porter v. Commissioner, 388 F.2d 670, 671 (6th Cir. 1968); Bardwell v. Commissioner, 318 F.2d 786, 789 (10th Cir. 1963).

[14]Gerta Runtch, 30 CCH Tax Ct. Mem. 856 (1971). Section 71 (a) (1) is mandatory, not elective.

The initial investigation requires a determination of what is a decree of divorce or separation. While payments under interlocutory divorce decrees do not qualify under section 71 (a) (1),[15] such payments might qualify under section 71 (a) (3) as support payments. Certain court proceedings which are similar to divorce proceedings have also been held to qualify as a decree for the purposes of the Code.[16] Foreign divorces, such as Mexican divorces, have been held to qualify, even though a state court had declared the foreign divorce decree invalid.[17] It should be noted, however, that the Internal Revenue Service has indicated it will not follow these cases.[18]

In addition, the courts and the Internal Revenue Service have broadly intrepreted the language of section 71 (a) (1) which concerns a written instrument incident to a decree of divorce or separation.[19] As a result, almost any written agreement which affects the decree and which provides for payments to the wife will qualify.

B. Written Separation Agreement

The 1954 Code provides for favorable tax treatment to payments made pursuant to a written separation agreement even if there is no divorce decree by a court. Under section 71 (a) (2), if a wife and her husband are separated and living apart, payments made to the wife by the husband pursuant to a written separation agreement executed after August 16, 1954, are taxable to the wife and deductible by the husband.[20] If a pre-1954 separation agreement is materially modified after August 16, 1954, the tax treatment will be as if the agreement itself

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[15]Rev. Rul. 368, 1957-2 CUM. BULL. 896.

[16]*See, e.g.,* Legget v. Commissioner, 329 F.2d 509 (2d Cir. 1964) (decree granted alimony, but no divorce); George F. Reisman, 49 T.C. 570 (1968), *acquiesced in,* 1971-2 CUM. BULL. 3 (payments under an annulment action qualified); *cf.* Robert H. Glicker, 7 CCH 1973 STAND. FED. TAX REP. (T.C. Mem. 1973-91) ¶ 7335 (M) (Apr. 17, 1973) (a state court's finding of adequate support was not a decree).

[17]Borax v. Commissioner, 349 F.2d 666 (2d Cir. 1965), *cert. denied,* 383 U.S. 935 (1966). *See also* Wondsel v. Commissioner, 350 F.2d 339 (2d Cir. 1965).

[18]Rev. Rul. 442, 1967-2 CUM. BULL. 65; *cf.* Rev. Rul. 390, 1971-2 CUM. BULL. 82, where no state court has declared the Mexican decree invalid, the husband and wife are considered divorced for federal tax purposes.

[19]*See, e.g.,* Berniece Morris, 26 CCH Tax Ct. Mem. 418 (1967); Rev. Rul. 41, 1960-1 CUM. BULL. 33. An amendment to the separation agreement was considered incident to the divorce. This clause of section 71 (a) (1), concerning an agreement incident to a decree, was in the 1942 Revenue Act, but is no longer needed since section 71 (a) (2) concerns all written separation agreements executed after 1954.

[20]Turpin v. United States, 240 F. Supp. 171 (W.D. Mo. 1965). August 16, 1954, was the effective date of the 1954 Code.

had been executed after August 16, 1954.[21] The writing must be more than just proof of an oral agreement; it should also specify the terms of the agreement and be signed by both the husband and the wife.[22] Since uniformity was one purpose for the enactment of section 71,[23] the federal tax effect is not changed even where the separation agreement is not enforceable under local law.[24] It should be noted, however, that the provisions of this section do not apply if the husband and wife file a joint return.

C. *Decree For Support*

The same tax results may also be obtained for support payments or temporary alimony payments made prior to a divorce decree and where no separation agreement has been executed. If a wife and her husband are separated and living apart, payments by the husband pursuant to a decree for support entered after March 1, 1954, are taxable to the wife and deductible by the husband under section 71(a)(3).[25] A simple order of support by the court will qualify the payments for this tax treatment, provided the parties are separated and living apart, and a separate tax return is filed by the husband and wife.[26]

D. *Periodic versus Installment Payments*

To qualify for section 71 (a) tax treatment, *(i.e.,* taxable to the wife and deductible by the husband), the payments made by the husband have to be "periodic" in nature. The Code does not define periodic payments, but section 71 (c) (1) states that installment payments discharging a principal sum are not considered periodic. Similarly, a single "lump sum" payment of a principal sum is not periodic. The distinction between an installment payment and a periodic payment is crucial, since *installment* payments are neither taxable to the wife nor deductible by the husband, whereas *periodic* payments are

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[21]Mavity v. Commissioner, 341 F.2d 865 (2d Cir. 1965).

[22]Garner v. Commissioner, 7 CCH 1973 STAND. FED. TAX REP. (T.C. Mem. 1973-79) ¶ 7322(M) (Apr. 9, 1973). A letter from an attorney and a written interrogatory did not constitute a written separation agreement.

[23]*See* note 13 *supra.*

[24]Treas. Reg. § 1.71-1 (b) (1) (1957); *accord,* Blanche C. Newberry, 46 T.C. 690 (1966), *acquiesced in,* 1970-30 CUM. BULL. 7; *cf.* Taylor v. Campbell, 335 F.2d 841 (5th Cir. 1964).

[25]Treas. Reg. § 1.71-1 (b) (3) (iii) (1957) provides that a pre-1954 decree modified after March 1, 1954, by court order will also qualify.

[26]Treas. Reg. § 1.71-1 (a) (3), (b) (3) (1957). *See also* Rev. Rul. 321, 1958-1 CUM. BULL. 35.

taxable to the wife and deductible by the husband.[27] As will be seen, this distinction is based primarily upon certainty of the amount to be paid.[28]

1. Ten Year Requirement

Often the decree or agreement will provide for a fixed and definite sum to be paid, but the husband will be financially unable to make a single large payment and will have to make installment payments on this principal sum. These installment payments will be treated as periodic payments where the payments are to be made over a period ending *more than 10 years* from the date of the decree, instrument, or agreement.[29] Furthermore, the portion of the payment treated as periodic will be limited to 10 percent of the principal sum;[30] thus, this "10 percent rule" will only affect situations where the payments are unequal throughout the payment period. For example, if the husband is required to pay his ex-wife a principal sum of $60,000, payable at $5,000 per year for 12 years subject to no contingencies, then all payments would qualify as periodic since each year's payment was less than 10 percent of the principal sum.[31] If, however, the payments are to be $8,000 per year for the first 6 years and $2,000 per year for the remaining 6 years, the results would be different. For each of the first 6 years, 10 percent of the principal sum, or $6,000, would be treated as a periodic payment. The remaining $2,000 would be considered an installment payment on a principal sum (thus not taxable to the wife nor deductible by the husband). The $2,000 paid during each of the last 6 years would be treated as periodic, of course, if the decree or agreement had provided for the payment of the principal sum of $60,000 in less than 10 years, none of the payments would be treated as periodic.

The Code provides that the 10-year period starts on the date of the ". . . decree, instrument, or agreement, ..."[32] In interpreting this clause, the courts have looked to applicable state law to determine the source of the husband's obligation to make the payments.[33] In com-

[27]Smith's Estate v. Commissioner, 208 F.2d 349 (3d Cir. 1953).

[28]Tate v. United States, 207 F. Supp. 426 (E.D. Tenn. 1962).

[29]INT. REV. CODE of 1954, § 71 (c) (2).

[30]*Id.*

[31]If the husband missed one of the annual payments, however, and paid two payments the following year, the 10-percent rule would apply. Only 10 percent of the principal sum, or $6,000, would be deductible even though the two payments totaled $10,000.

[32]INT. REV. CODE of 1954, § 71 (c) (2).

[33]Gordon L. Munderloh, 48 T.C. 452, 463 (1967), *acquiesced in,* 1970-2 CUM. BULL. xx. The Tax Court held that under state law the separation agreement was

puting the 10-year period, only payments made *after* the decree or separation agreement, whichever is to be the source of the obligation, are to be considered.[34] In Mississippi, the separation agreement should be considered the source of the obligation,[35] and the date of the agreement should start the 10-year period.[36]

Caution should be used in practice since it may be difficult to predict exactly when the 10-year period will start. When planning to achieve periodic tax treatment for a client, an attorney should extend the payments well beyond 10 years from the date of the agreement or decree, or make the payments subject to a contingency as discussed below. If the non-taxable feature of the installment payments is desired, the payments should be completed within 10 years from the date of the agreement or decree and be subject to no contingencies.

2. Contingencies

Whenever the payments by the husband are to terminate upon the happening or non-happening of a certain event, there is no certainty of amount; thus the payments are subject to a contingency and are considered periodic.[37] For example, where the payments are conditional upon the death of either spouse, remarriage of the wife, or a change in the economic circumstances of either party, there is a contingency present. If a contingency is present, the payments will be considered periodic even though there is a fixed sum to be paid in less than 10 years.[38] Furthermore, the 10 percent rule concerning payments extending beyond 10 years will not be applicable whenever there is a contingency present; thus the entire payment will be deemed periodic.[39]

Since a contingency may be present even though not expressly stated in the decree or separation agreement if it is imposed by local

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the source of the obligation, and the 10-year period began to run on the date of the agreement. *Contra,* Joslin v. Commissioner, 424 F.2d 1223 (7th Cir. 1970), *aff'g* 52 T.C. 231 (1969), holding that the obligation arose from the date of the divorce decree. *See also* Gordon M. Eno, 24 CCH Tax Ct. Mem. 1122 (1965), holding that the date of the final decree is to be used when there has been an interlocutory decree.

[34]Furrow v. Commissioner, 292 F.2d 604 (10th Cir. 1961). *See also* Leroy Keebler, 28 CCH Tax Ct. Mem. 1042 (1969); *accord,* Forest R. Lemasters, 30 CCH Tax Ct. Mem. 218 (1971), *aff'd,* CCH 1972 STAND. FED. TAX REP., U.S. TAX CAS. (72-2, at 85,451) ¶ 9612 (7th Cir. Aug. 10, 1972).

[35]J. BUNKLEY & W. MORSE, DIVORCE AND SEPARATION IN MISSISSIPPI § 11.03 (1957).

[36]*See* Gordon L. Munderloh, 48 T.C. 452 (1967), *acquiesced in,* 1970-2 CUM. BULL. xx.

[37]Tate v. United States, 207 F. Supp. 426 (E.D. Tenn. 1962).

[38]*See, e.g.,* Maralla C. Salapatas, 28 CCH Tax Ct. Mem. 1205 (1969), *aff'd,* 446 F.2d 79 (7th Cir. 1971); Baker v. Commissioner, 205 F.2d 369 (2d Cir. 1953).

[39]Treas. Reg. § 1.71-1 (d) (4) (1957).

law,[40] it might be virtually impossible at times for the parties to receive non-periodic treatment (no deduction by the husband and no taxation on the payments to the wife). In *Alton F. Lounsbury*,[41] the parties attempted to negate any contingencies by executing a separation agreement providing for non-periodic treatment. The payments were to be payable in all events and were not to terminate even if a subsequent divorce decree modified the separation agreement. The separation agreement was in fact incorporated in a later divorce decree, but the agreement was not modified. The Tax Court held there was a contingency present and the payments were periodic, since under the applicable state law, the separation agreement could have been modified as to any payments not yet due. A similar result would arise in Mississippi, since a separation agreement which is later incorporated into a divorce decree can be modified as to the alimony terms in the agreement.[42] The *Lounsbury* case defeats the purpose of uniformity and predictability which was one reason for the enactment of section 71,[43] and causes the determination of whether payments will be periodic or non-periodic to depend upon applicable state law. Thus the result in *Lounsbury*, which involved federal taxation, would have been different if the state law had not supplied a contingency.[44]

In planning, the parties should seek to achieve the best over-all tax result. In the usual situation, periodic payments should be used so that the husband will receive a deduction for the payments. Assuming the husband is in a higher tax bracket than the wife, the benefit of the deduction to the husband would be greater than the tax imposed upon the wife. To achieve the periodic treatment, the payments should expressly be made subject to various contingencies or be payable over a period of more than 10 years. For example, the payments should be terminable upon remarriage or death of the wife. On the other hand if the wife is in a higher tax bracket, the lump-sum treatment would be more favorable. Since the wife would not be taxed upon the payments

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[40]Treas. Reg. § 1.71-1 (d) (3) (ii) (1957). In Mississippi, for example, remarriage of the wife terminates alimony. J. BUNKLEY & W. MORSE, *supra* note 35, § 6.07; Rev. Rul. 190, 1959-1 CUM. BULL. 23. Under applicable state law, an obligation to pay alimony terminated upon death of either spouse, therefore the payments were periodic.

[41]37 T.C. 163 (1961), *aff'd on other grounds*, 321 F.2d 925 (9th Cir. 1963).

[42]Keller v. Keller, 230 So. 2d 808 (Miss. 1970); Logue v. Logue, 234 Miss. 394, 106 So. 2d 498 (1958).

[43]*See* note 13 *supra*.

[44]*See, e.g.*, William D. Price, 49 T.C. 676 (1968). Since alimony is against public policy in Texas, the agreement would never be modifiable; *accord*, Richard T. Daniel, Jr., 56 T.C. 655 (1971).

made by the husband, her tax savings would be greater than the husband's savings if he received a deduction for the payments. It will be difficult to anticipate the lump-sum treatment since the local law might supply an unwanted contingency. The following conclusions, however, may safely be made concerning lump-sum treatment:

(1) If a separation agreement negates all contingencies that might be supplied by local law; provides for a lump sum payable in less than 10 years; and there is no subsequent divorce decree; then the lump-sum treatment should be received.

(2) If, however, a divorce decree is obtained subsequent to the execution of such an agreement, and the decree incorporates the agreement; and if the decree is modifiable under the applicable state law, the payments would be considered periodic.

(3) An outright single lump-sum payment discharging the husband's obligation should receive the lump-sum treatment.

E. Support and Property Settlement Payments

Normally both the husband and wife will accumulate property interests during their marriage. In the event of a divorce or separation, the spouses, their attorneys, and the court will decide how the property rights of each spouse should be satisfied. Usually it will not be feasible to have an actual partition of the property; thus the husband will normally agree, or be ordered by the court, to make payments to the wife in discharge of her property rights. Such payments are not attributable to the wife's maintenance or support, therefore they will not receive periodic treatment.[45]

Normally the divorce decree or separation agreement will contain provisions relating both to property settlements and support rights. The decree or agreement will usually provide for each payment, whether a single payment or a series of payments, to discharge both the property settlement and the support obligation. Where the coverage of each payment is not specified, a problem sometimes arises in determining what part of the payment is allocated to the property settlement, and what part is allocated to the support rights.[46] The courts will often look to the substance of the transaction to determine the true intent of the

[45]Michael N. Lambros, 30 CCH Tax Ct. Mem. 585 (1971).

[46]Support payments, *if* periodic will be deductible by the husband. William M. Hardy, 59 T.C. No. 84 (Mar. 29, 1973), which held that to be deductible, it is not enough to show that payment is for support. It must be shown that the payment is either periodic or an installment of a lump sum being paid back over a period in excess of 10 years.

parties.[47] The courts have set forth various factors to consider in making this determination: (1) are the payments related to the husband's income;[48] (2) is there a fixed sum payable in all events;[49] (3) did the wife transfer her own independent property interests to the husband for no apparent consideration;[50] (4) did the parties negotiate in terms of the value of property owned by them, or were negotiations conducted strictly in terms of the wife's needs and the husband's resources;[51] and (5) are the payments terminable upon the death or remarriage of the wife, or do they continue for a specified period in all events.[52] In addition, the size of the payments will also be considered.[53] A lump-sum payment indicates that payments are probably in discharge of a property settlement, whereas a series of payments spread over a long term indicates they are for support.[54]

If there is a clear distinction as to how the payments are to be divided, separate tax treatment will usually be given.[55] If the distinction is not so clear, however, the court may look to the parties' negotiations, prior agreements, and contingencies existing as to any part of the payments for evidence upon which to base an allocation.[56] For example, if a contingency exists as to part of a payment which is otherwise an installment on a principal sum in settlement of property rights, then any part subject to the contingency will be considered periodic. The remainder would receive the non-taxable lump-sum treatment.[57]

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[47]*See, e.g.*, West v. United States, 332 F. Supp. 1102 (S.D. Tex. 1971); Robert I. Martin, 31 CCH Tax Ct. Mem. 1219 (1972), where the court looked to parol evidence to determine intent of the parties.

[48]George C. DeSmyter, 7 CCH 1973 STAND. FED. TAX REP. (T.C. Mem. 1973-90) ¶ 7334(M) (Apr. 17, 1973).

[49]*Id.*

[50]*See* Hazel Porter, 25 CCH Tax Ct. Mem. 448 (1966), *aff'd per curiam*, 388 F.2d 670 (6th Cir. 1968).

[51]*See* R. A. Bernatschke, 364 F.2d 400 (Ct. Cl. 1966).

[52]*Compare* H. R. McCombs, 397 F.2d 4 (10th Cir. 1968), *with* E. H. Bardwell, 318 F.2d 786 (10th Cir. 1963).

[53]*See* Treas. Reg. § 1.71-1(b)(6) (1957).

[54]*See, e.g.*, Robert P. Garvey, 25 CCH Tax Ct. Mem. 1135 (1966); Ann H. Ryker, 33 T.C. 924 (1960).

[55]*See, e.g.*, Smith's Estate v. Commissioner, 208 F.2d 349 (3d Cir. 1953); William M. Haag, 17 T.C. 55 (1951); Edward Bartsch, 18 T.C. 65 (1952), *aff'd per curiam*, 203 F.2d 715 (1953). Where the decree or agreement clearly specifies what portion of the payment is allocated to property settlement, separate tax treatment will be given.

[56]William F. Hagenlock, 26 CCH Tax Ct. Mem. 722 (1967).

[57]*See, e.g.*, Fidler v. Commissioner, 231 F.2d 138 (9th Cir. 1956); Brantley L. Watkins, 53 T.C. 349 (1969), *acquiesced in*, 1970-2 CUM. BULL. xxi, where 43 percent of the total obligation would be forfeited by the wife upon her subsequent

F. Marital or Family Relationship

To achieve the tax results of section 71, support payments made by the husband have to be in discharge of a legal obligation imposed upon the husband because of the marital or family relationship.[58] The husband has to be legally obligated to make the payments; therefore, voluntary payments made to a former spouse do not come within section 71.[59] Similarly, payments made to repay a bona fide loan previously made to the husband by the wife would not be subject to taxation under section 71.[60]

G. Arrearages, Advances, and Modifications

Often a husband may fall behind in his payments to his ex-wife and will "catch-up" by paying all the delinquent payments in a lump sum. In such a case, the lump-sum payment will receive the same tax treatment as the delinquent payments would have received if they had been paid on time. For example, if delinquent payments are periodic payments for the wife's support, the entire amount paid to discharge these past due payments would receive periodic treatment.[61] Likewise, if the delinquent payments were to receive the installment tax treatment, the amount subsequently paid to discharge these past due payments would also receive installment tax treatment.[62]

When past due periodic payments are subsequently paid in a lump sum, there could be harsh tax consequences to the wife. The entire amount paid to discharge the past due payments would be includable in the wife's income for the year in which it was received.[63] Of course, this could have the effect of putting the wife in a higher tax bracket. If the husband is in a high tax bracket, then a lump-sum payment of

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remarriage; thus 43 percent of each payment would be considered for support and would receive periodic treatment.

[58]INT. REV. CODE of 1954, § 71 (a).

[59]Martha K. Brown, 50 T.C. 865 (1968), *aff'd per curiam*, 415 F.2d 310 (4th Cir. 1969). An example would be where payments are made in lieu of an order for temporary alimony. Sylvia E. Taylor, 55 T.C. 1134 (1971). *See also* Allen Hoffman, 54 T.C. 1607 (1970), *aff'd*, 455 F.2d 161 (1972); Dorthy Herrman, 23 CCH Tax Ct. Mem. 429 (1964).

[60]Treas. Reg. § 1.71-1 (b) (4) (1957).

[61]Sara Dalton, 34 T.C. 879 (1960); Rev. Rul. 457, 1955-2 CUM. BULL. 527. *See also* Liberty Nat'l Bank & Trust Co. v. United States, CCH 1969 STAND. FED. TAX REP., U.S. TAX CAS. (69-1, at 83, 727) ¶ 9147 (S.D. Ga. May 22, 1968). An exception would be where delinquent periodic payments are paid in a lump sum. *See* note 31 *supra*.

[62]*See* Alton F. Lounsbury, 37 T.C. 163 (1961), *acquiesced in*, 1962-1 CUM. BULL. 5, *aff'd*, 321 F.2d 925 (9th Cir. 1963).

[63]Treas. Reg. § 1.71-1 (b) (5) (1957).

delinquent support payments would prove advantageous to him. He would be required to deduct the entire amount in the year in which it was paid.[64] The problems that could arise due to the payments of delinquent support payments should be resolved by the attorneys during the negotiations. For example, the wife's attorney might want to insert a penalty clause to prevent the husband from becoming delinquent on the support payments.

The parties to a separation agreement or a decree of divorce or separation may subsequently modify their agreement or have the decree modified to change the nature of the payments.[65] Whenever the modification concerns past due payments, the payments under the modification will be taxed the same as the delinquent payments would have been taxed if they had been paid.[66] When the modified agreement or decree concerns future payments, then the nature of the payments will depend upon the provisions of the new agreement or decree. If, by the modified agreement or decree, the parties decide to have all future obligations, even though formally periodic in nature, discharged by a lump-sum payment or series of payments, then the new payments will not be regarded as periodic, provided the provisions of the new agreement qualify the payments for the lump-sum treatment.[67] Where payments made under a modified agreement or decree are sought to be treated as periodic, such payments must meet the 10-year requirement as of the date of the modification, or be subject to a contingency.[68] An agreement or decree should specify exactly what part of the payment is for arrearages and what part is for future obligations to insure the proper tax treatment.

H. Income Tax Returns

Since the provisions of section 71 (a) (1) are mandatory,[69] a joint return cannot be filed once there has been a decree of divorce or separation.[70] If there has been only a separation agreement under section

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[64]Treas. Reg. § 1.215-1 (a) (1957).

[65]*See, e.g.*, MISS. CODE ANN. § 2743 (1956); J. BUNKLEY & W. MORSE, *supra* note 35, § 6.11.

[66]Virginia B. Davis, 41 T.C. 815 (1964).

[67]Frenk J. Loverin, 10 T.C. 406 (1948).

[68]Forest R. Lemasters, 30 CCH Tax Ct. Mem. 218 (1971), *aff'd*, CCH 1972 STAND. FED. TAX. REP., U.S. TAX CAS. (72-2, at 85, 451) ¶ 9612 (7th Cir. Aug. 10, 1972). There can be no addition of the years for payments made prior to the modification and those made after the modification.

[69]Gerta Runtch, 30 CCH Tax Ct. Mem. 856, 857 (1971).

[70]INT. REV. CODE of 1954, § 6013 (d); *cf.* Rev. Rul. 368, 1957-2 CUM. BULL. 896, holding that parties can file a joint return under an interlocutory divorce decree.

71 (a) (2), or a support order under section 71 (a) (3), the parties may choose whether to file a joint return or separate returns. To receive the tax treatment of section 71 (a), however, separate returns must be filed. When no decree has been rendered the parties should decide which return will achieve the most favorable overall tax result and file accordingly.[71]

IV. Child Support

Whenever there is a divorce or separation, the husband will normally be required to furnish support for any minor children of the marriage. Payments made by the husband to the wife for the support of his minor children are not deductible by the husband nor taxable to the wife.[72] To qualify as child-support payments, the amount payable for child support must be specifically designated by the decree, instrument, or agreement.[73] The courts have narrowly interpreted the wording of section 71 (b) and have strictly followed the Supreme Court's decision in *Commissioner v. Lester*.[74] Thus, where child support is not specifically designated, the entire payment will be considered as alimony and will receive periodic treatment.[75] For example, if the decree provides for a monthly payment of $500 for support of the wife and children, and the payments are to be reduced to $300 per month upon the wife's remarriage, it would seem that $300 of the payment would be considered child support. The Tax Court, however, has held that if words of the agreement or decree do not specifically fix the amount payable for child support, separate tax treatment will not be received.[76]

If the total payment is to cover both child support and alimony, and the amount actually paid by the husband is less than such total, the payment is first applied to child support.[77] For example, suppose the decree specifies $200 per month for child support and $300 per month for alimony, but the husband pays only $300. In this event, $200 would

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[71]It should be noted, however, that under § 6013 (d) (3), the liability for the tax under a joint return is joint and several.

[72]Int. Rev. Code of 1954, § 71 (b).

[73]Commissioner v. Lester, 366 U.S. 299 (1961); Int. Rev. Code of 1954, § 71 (b).

[74]366 U.S. 299 (1961); *see* Betty L. Nelson, 7 CCH 1973 Stand. Fed. Tax Rep. (T.C. Mem. 1973-80) ¶ 7323 (M) (Apr. 9, 1973); Homer H. Hewitt III, 31 CCH Tax Ct. Mem. 1247 (1972); Virginia Donohue, 29 CCH Tax Ct. Mem. 864 (1970).

[75]Jack Galin, 32 CCH Tax Ct. Mem. 269 (1973).

[76]*See* Betty L. Nelson, 7 CCH 1973 Stand. Fed. Tax Rep. (T.C. Mem. 1973-80) ¶ 7323 (M) (Apr. 9, 1973), holding that the intent of the parties is irrelevant; Homer H. Hewitt III, 31 CCH Tax Ct. Mem. 1247 (1972); Rev. Rul. 557, 1970-2 Cum. Bull. 10.

[77]Martha J. Blyth, 21 T.C. 275 (1953); Int. Rev. Code of 1954, § 71 (b).

be considered child support, therefore not taxable or deductible, and $100 would be considered a periodic alimony payment.

To qualify as child support, the payment must be for the support of minor children of the husband.[78] Thus, if the payment is for the support of a child by the wife's previous marriage, the payment does not qualify as child support.[79] A minor child, for the purposes of section 71 (a), is one who has not reached the age of 21, even though the state law might provide that majority is reached at a different age.[80]

After the *Lester* decision in 1961, many decrees were amended.[81] The courts have allowed such amendments to be effective as to payments made subsequent to the *Lester* decision, but have refused to allow any retroactive effect.[82] In light of *Lester,* the parties to a divorce or separation should determine exactly what amount is needed for the support of the children and what amount is needed for the wife's support. If these amounts are specifically designated in the decree, instrument, or agreement, the desired tax results should be obtained.

V. Dependency Exemption For Children

During their marriage, a husband and wife will normally file a joint income tax return under section 6013 and will claim an exemption for each of their minor children under section 151. When the spouses are divorced and file separate returns, controversies usually arise over which parent is entitled to the dependency exemption for their children.[83]

In 1967, Congress enacted a new provision which set forth guidelines to follow in determining which spouse is to get the exemption.[84] The following criteria are required under section 152 (e): (1) the combined amount contributed by both parents must be more than one-half of the child's total support; (2) the parents have to be divorced or legally separated under a decree or under a written separation agree-

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[78]Int. Rev. Code of 1954, § 71 (b).

[79]Faber v. Commissioner, 264 F.2d 127 (3d Cir. 1959).

[80]William E. Borbonus, 42 T.C. 983 (1964).

[81]*See, e.g.,* Guthrie v. United States, 264 F. Supp. 840 (W.D. Ark. 1967).

[82]*Id.;* Rev. Rul. 52, 1958-1 Cum. Bull. 29; *cf.* Rev. Rul. 416, 1971-2 Cum. Bull. 83, where an amendment to correct a mathematical error was given retroactive effect.

[83]*See, e.g.,* Harry C. Faust, 20 CCH Tax Ct. Mem. 1035 (1961). It should be noted that when a parent is entitled to the dependency exemption for his child, the child is also considered a dependent for the purpose of calculating the deduction for medical expenses under Int. Rev. Code of 1954, § 213.

[84]Int. Rev. Code of 1954, § 152 (e), applicable with respect to taxable years after December 31, 1966.

ment;[85] and (3) the child has to be in the custody of one or both parents for more than one-half of the year. If these criteria are met, there is a presumption that the parent *having custody* of the child contributes more than one-half of the child's support and will be entitled to the exemption.[86] There are two exceptions to this general rule, however. The parent *not having custody* of the child will be entitled to the exemption if the following conditions exist: (1) if the decree or agreement specifies that the non-custodial parent is entitled to the exemption, and that parent provides at least $600 for the child's support,[87] (2) if the non-custodial parent contributes $1,200 or more for the child's support, and the custodial parent does not clearly establish that he or she provided more than the non-custodial parent.[88] If there is a dispute concerning which parent contributed the greater amount, each parent may request an itemized statement of expenditures.[89] Furthermore, in determining whether either or both spouses contributed more than one-half of the total support of the child, support from all other sources is included.[90]

As might be expected, there have been numerous cases concerned with which parent contributed more to the child's support.[91] In addition, determining what the parent can include as child support has been a major issue. Support may include, among other things, food, shelter, clothing, medical and dental care, and educational expenses.[92] The custodial parent may include a portion of the fair rental value of the home.[93] Entertainment expenses,[94] transportation expenses,[95] and medical

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[85]Generally the rules concerning the validity of decrees and agreements, as discussed previously, will apply in this context. An oral agreement, for example, will not qualify. *See* Vernon L. Sheely, 59 T.C. No. 51 (Jan. 8, 1973).

[86]INT. REV. CODE of 1954, § 152(e) (1).

[87]*Id.* § 152(e) (2) (A).

[88]*Id.* § 152(e) (2) (B). The $1,200 sum may cover more than one child, regardless of the number of children. The burden is on the parent to prove by a clear preponderance of the evidence that he contributed more than the other. William G. Wohner, 31 CCH Tax Ct. Mem. 1166 (1972); Allen F. Labay, 55 T.C. 6 (1970), *aff'd per curiam*, 450 F.2d 280 (5th Cir. 1971).

[89]INT. REV. CODE of 1954, § 152(e) (3).

[90]John A. Frazier, 32 CCH Tax Ct. Mem. 74 (1973), where money received by the child from social services proved to be more than the husband's contribution, the husband was not entitled to the exemption.

[91]*See, e.g.*, Ruth L. Saubert, 32 CCH Tax Ct. Mem. 36 (1973); Richard D. Stanton, 30 CCH Tax Ct. Mem. 847 (1971).

[92]Treas. Reg. § 1.152-1(a) (2) (i) (1971).

[93]John C. O'Conner, 32 CCH Tax Ct. Mem. 156 (1973).

[94]Merrill M. Pye, 25 CCH Tax Ct. Mem. 451 (1966).

[95]Stanley A. Dunn, 25 CCH Tax Ct. Mem. 1471 (1966).

insurance premiums[96] have also been held to qualify as child support. Arrearages in child support, however, cannot be included in determining the parent's total contribution for the current year.[97]

Under prior law, a parent could not include in his contribution any amounts received for child support from his new spouse.[98] In an April, 1973, ruling the Internal Revenue Service changed their position, however, and stated that a parent who has remarried may include in his contributions for child support amounts contributed by his new spouse.[99] The Internal Revenue Service further announced that this ruling would be applied retroactively when the tax results would be favorable to the taxpayer; but if the tax effect would be adverse to the taxpayer, it would not be applied to any exemptions in years ending on or before April 16, 1973. This ruling resulted in the possibility of both parents claiming an exemption for the child in years ending before April 16, 1973, where there were contributions for child support from a new spouse. Taxpayers affected by this ruling should file for tax refunds for years not barred by the statute of limitations.[100] It should be kept in mind that these contributions by the new spouse must be in the nature of child support, and the rules concerning payment for child support must be met. For example, where payments are made by the husband for the support of both the wife and the child, but the child support is not specifically designated, no part of the payment can be claimed as a contribution for child support in determining whether the husband is entitled to the dependency exemption.[101]

In some instances, several persons will provide child support, and a multiple support agreement might be used.[102] If, for example, the parents and other relatives contribute to the child's support, but no one person contributes over one-half of the child's support, no one would be entitled to the dependency exemption. Under a multiple-support agreement, the supporting persons would agree to allow one of such persons to claim the exemption. A parent may also be entitled to reduced income tax rates as a head of a household under sections 1 (b) and 2 (b). To qualify as head of a household, the parent must be

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[96]*Id.;* Rev. Rul. 223, 1964-2 CUM. BULL. 50.

[97]Bobby R. Casey, 60 T.C. No. 8 (Apr. 9, 1973).

[98]*See* Rev. Rul. 19, 1971-1 CUM. BULL. 43. *See also* Martin Colton, 56 T.C. 471 (1971).

[99]Rev. Rul. 73-175, 1973 INT. REV. BULL. No. 16, at 6.

[100]A claim for a refund has to be filed within 3 years from date return was filed, or 2 years from time tax was paid, whichever is later. INT. REV. CODE of 1954, § 6511 (a).

[101]John A. Frazier, 32 CCH Tax Ct. Mem. 74 (1973).

[102]*See* INT. REV. CODE of 1954, § 152 (c); Treas. Reg. § 1.152 (3) (1963), for a detailed explanation of the requirements of a multiple support agreement.

legally divorced or separated at the close of the year, and the parent must pay over one-half the cost of maintaining the home which constitutes the principal place of abode of such parent and child.[103]

VI. Transferred Property

In many divorce cases, the husband will transfer property to the wife in satisfaction of her claims against him. The Supreme Court, in *United States v. Davis*,[104] held that a transfer of appreciated property to the wife is a taxable event, and any gain on the transfer must be recognized. The amount taxable as gain is the fair market value on the date of transfer less the transferor's adjusted basis.[105] For example, if the husband transferred stock, for which he paid $50,000 and which now has a fair market value of $100,000, to discharge his wife's claims, he would have a taxable gain of $50,000.[106] The wife receiving the property would not be taxed since the transfer was in discharge of her claims against her husband, and her claims are deemed equal in value to the property received.[107] The basis of the property in the wife's hands after the transfer is its fair market value on the date of the transfer; thus she would get a "stepped-up" basis.

Since a transfer of appreciated property is a taxable event, it would seem logical to allow a loss deduction for the transfer of depreciated property. A loss deduction, however, is not allowed. Section 267 of the Code disallows deductions for losses on transactions between related individuals. Furthermore, under section 165, losses are allowed only in transactions which were entered into for profit.[108] Nevertheless, there are two possible ways of taking the loss deduction where depreciated property is transferred.[109] Since section 267 prohibits losses on transfers between related parties, the transfer of the property could be postponed until after the divorce or separation has become final. Another solution would be to sell the depreciated property to another person, take the loss deduction, then give the wife the cash proceeds. If either of these two methods is used, however, care should be taken to keep the transfer

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[103]Betty L. Nelson, 7 CCH 1973 Stand. Fed. Tax Rep. (T.C. Mem. 1973-80) ¶ 7323 (M) (Apr. 9, 1973); Int. Rev. Code of 1954, § 2(b). *See* Treas. Reg. § 1.2-2(d) (1971), to determine what can be included as cost of maintaining a home.

[104]370 U.S. 65 (1962).

[105]*Id.*; Wallace v. United States, 309 F. Supp. 748 (S.D. Iowa 1970).

[106]The nature of the property transferred would determine whether the gain would be "capital" or "ordinary."

[107]Rev. Rul. 221, 1967-2 Cum. Bull. 63.

[108]For example, a deduction is not allowed for a loss incurred in the transfer of a residence. David R. Pulliam, 39 T.C. 883 (1963), *aff'd*, 329 F.2d 97 (10th Cir. 1964).

[109]The property has to be of the type that was obtained with a profit motive in mind.

or sale of the property completely separate from the divorce or separation. The desired tax result might still be lost if the Internal Revenue Service looks to the substance of the several transactions and finds, in reality, that there was only a transfer to the wife.[110]

In community-property states, transfers of property pursuant to a divorce are treated differently. Where an equal division of property is made pursuant to a divorce or separation in community-property states, the transfer is not deemed a taxable event.[111] Each spouse is considered to have a vested one-half interest in the community property; therefore the transfer would be only a division of the community property, and each spouse would keep their adjusted basis in the property.[112] If the division is unequal, however, the transfer will be a taxable event.[113] A result similar to that reached in community-property states is also reached in other states when state law requires an equitable division of property jointly acquired during the marriage.[114]

Because of the inconsistent income tax results between community-property states and non-community-property states, it has been proposed that legislation be passed to override the effects of the *Davis* decision.[115] Under this proposal, the transfer of property pursuant to a divorce would not be a taxable event. The wife's basis in the transferred property would be the same as the husband's basis prior to the transfer, thus she would not get a "stepped-up" basis.

VII. Specific Items

A. Alimony Trusts

The overall tax aspects of an alimony trust are quite complex and are beyond the scope of this paper. The general rules concerning alimony trusts, however, will be discussed.[116]

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[110]*See* McWilliams v. Commissioner, 331 U.S. 694 (1947).

[111]Frances R. Walz, 32 B.T.A. 718 (1935).

[112]Ida L. Swanson, CCH 1961 Stand. Fed. Tax Rep., U.S. Tax Cas. (61-1, at 79, 633) ¶ 9264 (W.D. Okla. Feb. 23, 1961).

[113]Maurine D. Brown, 12 CCH Tax Ct. Mem. 948 (1953).

[114]George F. Collins, Jr., 46 T.C. 461 (1966), *aff'd*, 388 F.2d 353 (10th Cir. 1968), *acquiesced in*, 1970-2 Cum. Bull. xix, *vacated*, 393 U.S. 215 (1968), *rev'd*, 412 F.2d 211 (10th Cir. 1969). *But see* Richard F. Wiles, Jr., 60 T.C. No. 7 (Apr. 9, 1973), where the Tax Court held that the transfer was not a taxable event. *See also* Beth W. Corp. v. United States, CCH 1973 Stand. Fed. Tax Rep., U.S. Tax Cas. (73-1, at 80, 032) ¶ 9110 (S.D. Fla. Nov. 24, 1972), where a division of property owned as tenants by the entireties was a non-taxable event.

[115]*See* 19 A.B.A. Taxation Section 63-66 (1966).

[116]For a comprehensive analysis of the tax treatment of alimony trusts, *see* Young, *Separation and Divorce and the Tax Laws: "Waltzes and Apache Dances"*, 22 Tax Lawyer 551 (1968); P-H Tax Ideas ¶ 13,004.3 (7), at 13,089 (1971).

Whenever a trust has been established for the wife prior to a divorce and not in contemplation of a divorce, section 682 is applicable. Under section 682, trust income payable to the wife after the divorce or legal separation is taxable to her as a trust beneficiary, and the trust conduit rules are applicable. The husband would not get a deduction for the payments from the trust, since the trust income would not be included in his gross income.[117] Payments received by the wife prior to a decree of divorce or separation under such a trust would be included in the husband's income under section 677. Where a trust is created pursuant to a divorce or separation, section 71 (a) is applicable and requires that payments to the wife from the trust be fully taxable to her, and the trust rules are not applied.[118] The payments from the trust would not be deductible by the husband.

A trust created for the wife may consist of securities on which the income is exempt from income tax. In *Ellis v. United States,*[119] the court held that payments to the wife made from a trusts' tax-exempt income are not taxable to the wife.[120] The husband would receive a greater tax savings without such a trust. He could retain the tax-exempt securities, receive the tax-exempt income under section 103, make the alimony payment to his wife, and take a deduction for the payments. The wife, of course, would have to include these payments in her income.

The rules of the *Davis* decision concerning taxation of transferred property also apply when appreciated property is transferred to a trust. The transfer is a taxable event, however, only if the creation of the trust results in a full discharge of the husband's obligation; if the husband remains liable for any deficiency, there is no taxable event.[121]

There could be serious adverse tax consequences resulting from an alimony trust; and since the rules governing alimony trusts are complex and subject to change in the near future,[122] these trusts should be avoided in the usual divorce case. If, however, it is determined that an alimony trust is desirable, care should be taken to strictly comply with the Code to insure the proper tax treatment.

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[117]INT. REV. CODE of 1954, § 215; Treas. Reg. § 1.215-1 (b) (1957).

[118]The result would be the same where a previously created trust was later used to satisfy the wife's claims against her husband arising out of a divorce or separation.

[119]416 F.2d 894 (6th Cir. 1969).

[120]*See* INT. REV. CODE of 1954, § 103.

[121]Rev. Rul. 47, 1959-1 CUM. BULL. 198.

[122]There have been suggestions to re-write the code sections concerning alimony trusts. *See, e.g.,* Peschel, *Income Taxation of Alimony Payments Attributable to Transferred Property: Congressional Confusion,* 44 TUL. L. REV. 223 (1970).

B. Legal Fees

Prior to 1963, legal fees incurred by the husband in protecting his property in a divorce action were deductible under section 212. In *United States v. Gilmore*,[123] the Supreme Court held that legal expenses incident to a divorce could not be deducted by the husband under section 212, since the basis for the legal expense was personal in nature. Nevertheless, some of the legal expense may still be deductible. Any part of the attorney's fee which is paid in consideration for tax advice obtained in relation to a divorce may be deducted by the husband.[124] This deduction for expenses relating to tax advice is provided in section 212 (3), which allows a deduction for expenses incurred in connection with the determination of any tax. Attorneys involved in a divorce case should clearly separate that portion of their fee allocable to tax advice so their client will be able to substantiate his deduction for the payment of the legal fee.

If the husband is successful in the divorce proceedings, and his property is protected from his wife's claims, the legal expenses incurred can be added to his basis in that property so that his gain will be reduced upon subsequent sale of the property.[125]

Under section 212 (3), expenses incurred in connection with the production or collection of income are deductible, therefore, a wife is allowed to deduct legal expenses incident to a divorce.[126] The word "income" in this context means "taxable income;" thus, where the legal expenses were incurred in relation to a property settlement, the deduction is disallowed.[127] If the amount collected by the wife covers both property rights and alimony or support rights, a pro-rata allocation should be made to compute the amount of the legal expense that may be deductible.

In some instances, the husband will pay the legal expenses for himself and his wife. In view of the present law, however, this should be avoided. A better tax result can be achieved by requiring the wife to pay her own attorney's fees, since they are deductible. The husband could then indirectly reimburse the wife through increased alimony payments, and the husband would receive a full deduction for these payments. Although the wife would be taxed on the increased ali-

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[123]372 U.S. 39 (1963); *accord*, United States v. Patrick, 372 U.S. 53 (1963).

[124]George v. United States, 434 F.2d 1336 (Ct. Cl. 1970); Carpenter v. United States, 338 F.2d 366 (Ct. Cl. 1964).

[125]Gilmore v. United States, 245 F. Supp. 383 (N.D. Cal. 1965).

[126]Ruth K. Wild, 42 T.C. 706 (1964), *acquiesced in*, 1967-2 CUM. BULL. 4.

[127]Treas. Reg. § 1.262-1 (b) (2) (1972).

mony payments, she would receive an off-setting deduction when the legal fee is paid.[128]

C. *Real Estate*

When real estate, such as the family residence, is transferred outright to the wife, the rules concerning transferred property discussed previously will apply, and there will be a taxable gain to the husband. Where the property is held jointly by husband and wife, the husband is taxed on the gain only to the extent of his interest that is transferred.[129] After property, such as the residence, is transferred to the wife, it is a normal situation for the husband to continue making the mortgage payments on the property. These payments are deductible by the husband and are included in the wife's income as alimony.[130] This is a logical result since the husband is not obligated to make the mortgage payments. If after the divorce, however, the husband still has an interest in the property, only part of the payment is deductible by him. For example, where the property is held jointly by husband and wife, only one-half of the mortgage payment may be deducted by the husband as an alimony payment.[131] Where jointly owned property has a survivorship interest, the husband must show that the wife is personally liable on the mortgage, or that the mortgage payments increased the wife's economic interest in the property, before he will be entitled to a deduction.[132] It should be noted that if the deduction for mortgage payments is disallowed because of the husband's interest in the property, he may receive a deduction under section 163 for interest paid on the mortgage. In any case where the husband seeks to deduct mortgage payments, he must establish that the payments are periodic in nature. If the payments are to discharge the mortgage in less than 10 years, the payments would be considered installment payments on a lump sum, therefore not deductible.[133]

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[128]This would have to be worked out during negotiations. The decree or agreement should not specifically mention payment by the husband of the wife's legal fees, since the Internal Revenue Service might look to the substance of the transaction and disallow the deduction.

[129]Robert K. Stephans, 38 T.C. 345 (1962). *See* section 1034 for situations in which there is no taxable gain on the sale of a residence.

[130]*Cf.* Rev. Rul. 39, 1962-1 CUM. BULL. 17.

[131]Richards v. Commissioner, 382 F.2d 538 (6th Cir. 1967); Rev. Rul. 420, 1967-2 CUM. BULL. 63. This one-half would be taxable as alimony to the wife.

[132]For example, if the wife's equity in the property is increased. *See* Neely B. Taylor, Jr., 45 T.C. 120 (1965).

[133]Harold I. Snyder, 25 CCH Tax Ct. Mem. 1326 (1966); *cf.* Van Orman v. Commissioner, 418 F.2d 170 (7th Cir. 1969), *aff'g* 27 CCH Tax Ct. Mem. 1440 (1968).

Where the husband pays all of the real estate taxes and property-insurance premiums, the rules concerning mortgage payments are applicable. The deduction will be allowed only to the extent of the wife's interest in the property.[134] Utility expenses paid by the husband are deductible as ordinary alimony payments whether he has an interest in the property or not. If the wife lives in a rented house and the rent is paid by the husband, the entire amount paid for rent will be treated as a periodic alimony payment.[135]

D. Medical Expenses

A wife's medical and dental expenses paid by the husband are deductible in full by the husband.[136] This is assuming that the payments are periodic in nature; so where there is a definite amount payable in all events in less than 10 years, the payments will be treated as installments on a principal sum, and there can be no deduction.[137] Payments for medical insurance premiums are also deductible by the husband.[138] Payments by the husband for his child's medical expenses are not deductible in full,[139] but if the child qualifies as the husband's dependent, the child's medical expenses will be deductible by the husband under section 213 subject to the 3 percent limitation.

E. Insurance and Annuities

In Mississippi, as in most states, death of either the husband or the wife will terminate the alimony or separate maintenance obligation.[140] The wife will usually want some protection in case of the husband's death, and this protection can be furnished through life in-

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[134]*Cf.* Rev. Rul. 38, 1962-1 CUM. BULL. 15, where a deduction for taxes was disallowed because of the husband's interest in the property. He may, however, take a deduction for such taxes under section 164.

[135]Alton F. Lounsbury, 37 T.C. 163 (1961), *aff'd on other grounds,* 321 F.2d 925 (9th Cir. 1963).

[136]Rev. Rul. 106, 1962-2 CUM. BULL. 21. The payments would be included in the wife's income as alimony. A deduction in full would be allowed only where separate returns are filed; thus where a joint return is filed prior to the divorce decree, the medical expenses are deductible under the 3 percent requirement of section 213.

[137]Aline S. Fisher, 15 CCH Tax Ct. Mem. 507 (1956); F. Ewing Glasgow, 21 T.C. 211 (1953).

[138]Illene Isaacson, 58 T.C. 659 (1972), *acquiesced in,* 1973 INT. REV. BULL. No. 11, at 5.

[139]The amount paid for a child's medical expenses can be included in the amount contributed for support in determining which parent is entitled to the dependency exemption.

[140]J. BUNKLEY & W. MORSE, *supra* note 35, § 6.07.

surance on the husband.[141] If all incidents of the insurance policy are absolutely assigned to the wife, the premium payments are treated as periodic alimony payments under section 71 (a).[142] When the policy has not been fully assigned to the wife, the premiums paid by the husband are not deductible.[143] Even with this tax deduction, however, it might still be detrimental to the husband to transfer the policy. For example, under the *Davis* rules concerning transferred property, the transfer of an insurance policy might result in a taxable gain to the husband.[144] From the husband's standpoint, it is generally advisable to retain the ownership of the policy and not take the deduction for premium payments. From the wife's standpoint, it might be advantageous to have absolute ownership of the policy, but it must be remembered that the premiums paid will still be taxed as alimony to the wife.

In some situations, a husband with adequate funds might wish to purchase, with a single lump-sum payment, an annuity to provide for the wife's alimony payments. This method might be convenient, but the tax results of an annuity are not advantageous to the husband or the wife. The husband will receive no deduction for the payments received by the wife, and the wife will be fully taxable under section 71 on the payments received under an annuity.[145] It should also be noted that if appreciated property is used to purchase the annuity, there will be a taxable event. Thus, in the normal situation an annuity should not be used to satisfy the wife's claims in a divorce or separation.

VIII. Gift Tax

There are also noteworthy gift tax consequences resulting from a divorce or separation. In *Merrill v. Fahs*,[146] the Supreme Court held that transfers of property in relinquishment of marital rights are taxable as gifts.[147] If the transfers are made to discharge the husband's

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[141]The court might require the husband to furnish life insurance to assure payment of alimony. *See, e.g.*, Klumb v. Klumb, 194 So. 2d 221 (Miss. 1967).

[142]Hyde v. Commissioner, 301 F.2d 279 (2d Cir. 1962); Rev. Rul. 218, 1970-1 Cum. Bull. 19, *superseding*, I.T. 4001, 1950-1 Cum. Bull. 27. There has to be virtually an absolute assignment. *See* Wanda Z. Stevens, 28 CCH Tax Ct. Mem. 711 (1969), *rev'd*, 439 F.2d 69 (2d Cir. 1971).

[143]Where the wife was only a contingent beneficiary, the deduction was disallowed. Hyde v. Commissioner, 301 F.2d 279 (2d Cir. 1962).

[144]Such would be the result if the cash value exceeded the total premiums paid.

[145]Int. Rev. Code of 1954, § 72 (k); Treas. Reg. § 1.71-1 (c) (2) (1958).

[146]324 U.S. 308 (1945).

[147]The Court applied section 2043 (b) of the estate tax provisions in holding that these transfers were for inadequate consideration.

obligation of support, the transfer is deemed to be for adequate consideration, and there is no taxable gift.[148] If property is transferred to satisfy support rights, however, there will be a gift tax to the extent the value of the property exceeds the total value of the support rights.[149] There are two exceptions to the rule that a transfer of property in relinquishment of marital rights results in a taxable gift. The first exception is provided for in section 2516, which was added after the Supreme Court's holding in *Harris v. Commissioner*.[150] In *Harris*, a transfer of property pursuant to a divorce decree was held not subject to the gift tax. Under section 2516, transfers in settlement of marital rights or for the support of minor children will not be taxable gifts if the following conditions are met: (1) the husband and wife enter into a written agreement concerning these marital and child support rights; and (2) a final divorce decree is rendered within 2 years of the date of the written agreement.[151]

The second exception for transfers relating to marital rights was provided by the *Harris* case. If the transfer is made pursuant to a court decree, it is considered to be for adequate consideration and is not deemed a taxable gift. Under this exception, the transfer of property has to be made pursuant to the decree; if the transfer is made prior to the decree, even under a separation agreement, a gift tax will be imposed.[152]

The decree exemption might be lost, however, if a prior separation agreement, which does not meet section 2516 requirements, is incorporated into a divorce decree, and the court has no power to amend the agreement.[153] In such a case, the agreement will be considered the source of the obligation, since the court has no power to amend or modify the terms of the agreement. As a result, the transfer will not be considered made pursuant to the decree, and the transfer will be a taxable gift.

It is difficult to predict the result in Mississippi. In *Logue v. Logue*,[154] the Mississippi Supreme Court held that the terms of a separation agreement concerning property settlements could not be

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148E.T. 19, 1946-2 CUM. BULL. 166.

149Estate of H. B. Hundley, 52 T.C. 495 (1969), *aff'd per curiam*, 435 F.2d 1311 (4th Cir. 1971); Rev. Rul. 379, 1968-2 CUM. BULL. 414.

150340 U.S. 106 (1950).

151INT. REV. CODE of 1954, § 2516. *See* INT. REV. CODE of 1954, § 6019, for the requirements of filing gift tax returns.

152Commissioner v. Barnard's Estate, 176 F.2d 233 (2d Cir. 1949).

153Estate of Chester H. Bowers, 23 T.C. 911 (1955), *acquiesced in*, 1955-2 CUM. BULL. 4.

154234 Miss. 394, 106 So. 2d 498 (1958).

modified as long as the settlement is supported by valid consideration. In *Keller v. Keller*,[155] the same court, although addressing itself to alimony terms, indicated that a subsequent court decree could modify all terms of a separation agreement. It is submitted that to allow modification of all the terms of the agreement, as the *Keller* case indicates, would provide the better results for tax purposes as well as for other reasons.[156]

Since there is a cloud of uncertainty in this area, the safe procedure to follow to avoid the imposition of a gift tax on transfers of property relative to marital rights is: (1) comply with section 2516 by executing a written separation agreement, followed by a final divorce decree within 2 years, incorporate the terms of the separation agreement in the divorce decree,[157] and transfer the property only after the final decree; or (2) comply with the *Harris* case by transferring the property pursuant to a divorce decree only.

IX. Estate Tax

Whenever property is transferred in discharge of marital rights, the estate tax presents problems similar to those arising under the gift tax. The primary consideration is whether the husband's obligation continues after his death. The decree, agreement, or local law will determine whether the obligation continues after, or terminates upon, death of the husband. In Mississippi, for example, the obligation will terminate upon death if the payments are peridocally made, unless the decree or agreement specifies otherwise. If the payment is lump sum, the obligation will not terminate.[158] If it is determined that the obligation continues after death of the husband, the next consideration is whether the transfer was made for adequate consideration, which would constitute a valid claim upon the estate. Under section 2033, a person's gross estate for estate tax purposes includes all property owned by the decedent at his death. Deductions for valid claims against the estate are allowed by section 2053, and section 2043 provides that a release of marital rights will not be adequate consideration to give rise to a deductible claim against the estate. If the transfer is made pursuant to a court decree of divorce or separation, it will be considered to have been made for adequate consideration and will be a

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[155]230 So. 2d 808 (Miss. 1970).

[156]For example, it would provide review to determine if either spouse was in an unfair bargaining position at the time the agreement was executed.

[157]Although section 2516 applies whether the decree incorporates the agreement or not, the incorporation into the decree should provide added protection.

[158]J. Bunkley & W. Morse, *supra* note 35, § 6.07.

deductible claim against the estate.[159] Where the decree incorporates a previously existing separation agreement, the problem arising under the gift tax concerning the court's power to amend the agreement will also be applicable under the estate tax provisions. If the court does not have power to modify the terms of the agreement, the agreement will be considered the source of the husband's obligation. In such a case, a deduction against the estate will be allowed only to the extent that transfers are made for the support of the wife or minor children, since support payments are valid claims against the estate.[160]

The courts have refused to apply the requirements of section 2516 to the estate tax area;[161] thus, there are no "safe-harbor" tests that can be met to avoid the estate tax in this area. Nevertheless, if the procedure previously suggested concerning the gift tax is followed, there should be no adverse estate tax consequences, since a divorce decree would be involved.[162]

X. Conclusion

As this comment indicates, there are only a few areas of uncertainty in the federal tax laws relating to divorce and separation. One uncertainty involves the estate and gift tax and concerns the divorce court's power to amend or modify the property-settlement terms of a previously executed separation agreement. Another major uncertainty is that it is virtually impossible to plan for the lump-sum tax treatment in light of the *Alton F. Lounsbury* decision.[163] Since there are only a few areas of doubt as to what the tax effects will be, an attorney should be able to inform his client of the resulting tax consequences in a divorce case.

Obtaining favorable tax results, of course, is not the most important goal toward which the parties should strive in planning for a divorce or separation. The most important considerations are to de-

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[159]Commissioner v. State Street Trust Co., 128 F.2d 618 (1st Cir. 1942); Rev. Rul. 160, 1960-1 Cum. Bull. 374.

[160]*See* Estate of Hubert Keller, 44 T.C. 851 (1965); Estate of Chester H. Bowers, 23 T.C. 911 (1955); Rev. Rul. 160, 1960-1 Cum. Bull. 374.

[161]*See, e.g.*, Estate of Robert Rodger Glenn, 45 T.C. 323 (1966).

[162]This is assuming that the decree, rather than the separation agreement, is held to be the source of the obligation. In the Mississippi case of Keller v. Keller, 230 So. 2d 808, 809 (Miss. 1970), the court states that, "[i]t is the decree of the court which the parties must obey, not the prior [separation] agreement." *But see* Logue v. Logue, 234 Miss. 394, 106 So. 2d 498 (1958). It is hoped that the *Keller* case will be interpreted to mean that property-settlement terms of an agreement can be modified by a subsequent court decree.

[163]37 T.C. 163 (1961), *aff'd on other grounds*, 321 F.2d 925 (9th Cir. 1963).

termine what the effect will be on the lives of the individual spouses and their children. With these considerations in mind, however, the attorneys for both spouses should negotiate to achieve the most favorable over-all tax results.

John P. Henson

AN ANALYSIS OF THE COMPREHENSIVE APPROACH TO THE PUBLIC-EMPLOYEE STRIKE PROBLEM

Introduction

This three part comment examines the problem of public-sector strikes with the goal of suggesting new ways of dealing with the problem. The conclusion is that the comprehensive program holds the greatest promise for a permanent solution of this issue.

Part I of the paper examines the origins of the comprehensive approach. Part II studies the various dispute-settlement techniques available for use in comprehensive programs. Part III deals with the elements of the comprehensive plan and some proposed plans.

I. Development of the Comprehensive Approach

Government employment has grown at an astounding rate since World War II. In fact, government employment is the fastest growing sector of the nation's work force.[1] In 1940, there were only 3.5 million workers employed by government, representing about 6.5 percent of the nation's work force.[2] By 1975, this figure is expected to exceed 15 million, or 20 percent of the nation's work force.[3] As the number of public employees has expanded, the number of public-employee strikes has grown also. In 1956, for example, there were 27 public-sector work stoppages.[4] By 1970, there were more than 400.[5]

The phenomenal rise in the number of government-employee work stoppages has promoted a reevaluation of traditional and existing approaches to treating the problem. The traditional view, that government employees do not have, and should not be given, the right to strike has not varied much through the years.[6] But the manner of dealing with strikes when they do occur has changed from demanding punitive measures to advocating the right of public employees to organize and bargain while providing other means than the strike for dissolving impasses.[7]

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[1] U.S. Dep't of Labor, Scope of Bargaining in the Public Sector: Concepts and Problems 1 (1972).

[2] *Id. See* Appendix, Table A.

[3] Bargaining in the Public Sector, *supra* note 1.

[4] *See* Appendix, Table B.

[5] *Id.*

[6] Goldberg, *Labor-Management Relations Laws in the Public Service,* 91 Monthly Lab. Rev. 48 (1968).

[7] *Id.*

This dramatic change in attitude has not come overnight. The common law rule, that public employees have no right to resort to the strike, even in the absence of an express strike prohibition,[8] had become well entrenched in American jurisprudence, with no reported cases holding contrary to the pervailing view.[9] The sentiment expressed by Calvin Coolidge during the 1919 Boston police strike that, "There is no right to strike against the public at any time, at any place, for any reason"[10] became enshrined in legal decisions, statutes, and public opinion as the basic doctrine of the law of labor relations in the public sector. Many statutes, like New York's harsh Condon-Wadlin Act,[11] meted out stiff penalties to striking public workers. Strikes were seen as a challenge to the very power and sovereignty of the government itself, and the courts ground out reams of decisions buttressing this popular view.[12] Even the epochal Wagner Act[13] excluded public employees from its coverage. Government at all levels enacted its own policies, ranging from complete bars to unionization and strike activity to allowing employees some voice in their working conditions.[14] Except for a brief flurry of strike activity immediately following World War II, the traditional attitude remained largely unchallenged by government employees.[15]

The traditional approach appeared to have brought a measure of tranquility to public-sector labor relations. It seemed improbable that public employees would dare bring the wrath of the law and public opinion down upon their heads by engaging in work stoppages. But cracks began to appear in the peaceful facade in the mid-1950's. Louder and more persistent employee demands, increased employee organization and better employee leadership began to challenge the traditional, comfortable viewpoint.[16] As the lush economy of the 1960's gave better pay and benefits to private-industry employees but not to public employees, as the inflation of the late 1960's worsened, and as other organized groups in society seized the objects of their demands by force,

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[8]Norwalk Teacher's Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951). *See* Annot., 31 A.L.R.2d 1133 (1951).

[9]Annot., 31 A.L.R.2d 1142, 1159 (1953).

[10]Zack, *Are Strikes of Government Employees Necessary?*, 53 A.B.A.J. 808 (1967).

[11]N.Y. Civ. Serv. Law § 108 (repealed 1967).

[12]Board of Educ. v. Redding, 32 Ill. 2d 567, 207 N.E.2d 427, 430 (1965); Howlett, *The Right to Strike in the Public Sector*, 53 Chi. B. Rec. 108, 111 (1971).

[13]29 U.S.C. § 141 *et seq.* (1970).

[14]Klaus, *Past, Present, and Some Prognostications* in Government Labor Relations in Transition 1 Public Personnel Report No. 662, (1966).

[15]*Id.*

[16]*Id.*

public employees grew more and more militant.[17] The rivulet of strike activity in the late 1950's became a torrent in the 1960's. New York was crippled repeatedly by work stoppages among teachers, sanitation workers, transit workers, firefighters and even white-collar workers. The federal government wrestled with postal workers' and air traffic controllers' stoppages. A strike by sanitation workers in Memphis culminated in the death of civil rights leader Martin Luther King, Jr. And scores of other work stoppages occurred at every level of government on large and small scales.[18] The legal prohibition of strikes, even where accompanied by stringent penalties, did not prevent public employees from striking. As the strike problem worsened, it became increasingly clear that the traditional approach was bankrupt and that new solutions would have to be sought.

New means of averting public-sector strikes began to be explored. Commissions, review panels and scholars turned out innumerable recommendations. Government at all levels began to re-shape its labor policy, with mixed results. New York, after a brief flirtation with a more stringent strike ban, appointed a commission to examine the problem and suggest a new law.[19] New York City experimented with a mayoral order authorizing collective bargaining for public employees within the framework of the strike ban, but it failed because it gave government employees no quid pro quo for the strike.[20] Chaos and confusion dominated the public-sector labor-management relationship.[21]

The federal government moved to fill this legal vacuum in 1962 with the adoption of Executive Order No. 10,988.[22] This order was

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[17]*See* Posey, *The New Militancy of Public Employees*, 28 PUB. AD. REV. 111, 117 (1968).

[18]TIME, Jan. 25, 1971, at 23 (New York police strike); COMMONWEAL, Sept., 1967, at 647 (New York teachers' strike); New York Times, March 27, 1970, at 1, col. 8 (Professional Air Traffic Controllers' strike); New York Times, August 7, 1969, at 25, col. 7 (Newark firefighters' strike); Memphis Commercial Appeal, April 5, 1968, at 13, col. 7 (Memphis sanitation workers' strike); Washington Post, Sept. 1, 1972, at A-12, col. 7 (teachers' strikes across the country).

[19]Kheel, *The Taylor Law: A Critical Examination of Its Virtues and Defects*, 20 SYRACUSE L. REV. 181 (1968).

[20]HABER, THE RELEVANCE OF PRIVATE SECTOR EXPERIENCE TO PUBLIC SECTOR COLLECTIVE BARGAINING 13-21 (PROCEEDINGS OF THE INSTITUTE OF MANAGEMENT AND LABOR RELATIONS CONFERENCE AT RUTGERS UNIVERSITY May 23, 1968).

[21]Twenty-five percent of all work stoppages in the sample year 1968 were due to refusal of the employer to recognize the employees' bargaining rights, while 45 percent were caused by disputes over wages or professional standards. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT 27 (1969).

[22]3 C.F.R. 521 (1959-63 Comp.) *superceded by* Exec. Order No. 11,491, 3 C.F.R. 262 (1973).

the end product of months of research by a presidential task force, and embodied the task force's proposals.[23] It gave federal employees the right to organize and bargain within the framework of civil service principles, and enumerated unfair labor practices and penalties for committing them.[24] Executive Order No. 10,988 was a dramatic development in the area of public-sector labor law. It recognized the principle that federal employees will be less inclined to strike if they are given a voice in determining their wages and conditions of employment while having channels other than the strike for resolution of their grievances.[25]

On the state level, Wisconsin adopted an approach similar to the federal one in 1962.[26] The Wisconsin approach set up machinery for dispute settlement, a board to administer the program, and a form of collective bargaining for public employees, all within the boundaries of a continuing strike prohibition.[27] Connecticut and Michigan followed the Wisconsin lead in 1965, and at least 15 states have now adopted the dispute-settlement approach.[28]

With the advent of the dispute-settlement technique, it appeared that the public-strike dilemma would be ended. Logically, the technique appeared flawless. It gave employees the voice in their affairs that they demanded, and set up alternatives to the strike for resolution of disputes. These programs began to sprout at every level of government, and in a bewildering variety.[29]

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[23]Wray, *Federal Employees and Collective Bargaining*, 14 N.Y.L.F. 301, 303 n.13 (1968).

[24]Klaus, *supra* note 14, at 2.

[25]*See* Wolk, *Employee-Management Cooperation: A Look at Executive Order 10,988*, 14 N.Y.L.F. 294 (1968).

[26]*See* Stern, *Wisconsin's Public Employee Fact-Finding Procedure*, 20 IND. LAB. REL. REV. 3 (1966).

[27]WIS. STAT. ANN. § 111.80 (1973).

[28]ALAS. STAT. §§ 23.40.010-.260 (1972); CAL. GOV'T CODE §§ 3500-11 (West Supp. 1972); CONN. GEN. STAT. ANN. §§ 7-467 to -478 (1972); DEL. CODE ANN. tit. 19, §§ 1301-13 (Supp. 1970); MICH. COMP. LAWS ANN. §§ 423.201-250 (1967); MO. REV. STAT. §§ 105.500-530 (Supp. 1973); NEB. REV. STAT. §§ 79-1287 to -1296 (1968); N.Y. CIV. SERV. LAW §§ 200-12 (McKinney 1973); ORE. REV. STAT. §§ 243.710-.780 (1969); R.I. GEN. LAWS ANN. §§ 28-9.4-1 to -19 (1969); VT. STAT. ANN. tit. 21, §§ 1701-07 (Supp. 1972); WASH. REV. CODE §§ 45.56.010-.950 (Supp. 1967); WIS. STAT. ANN. §§ 111.70, 111.80-.94 (1969).

[29]Statutes ranged in variety from relatively simple (NEB. REV. STAT. §§ 79-1287 to -1296 (1968)) to amazingly complex (California, for example, adopted separate codes to govern labor relations with different groups of government employees. CAL. EDUC. CODE §§ 13080-88 (West Supp. 1973); CAL. GOV'T CODE §§ 3500-11 (West Supp. 1972)).

Despite the proliferation of programs incorporating dispute settlement machinery, however, the public-sector strike problem only worsened. The number of work stoppages from 1962, the year of the enactment of the first dispute-settlement program, to 1970, increased from 28 to 412.[30] It began to appear that nothing could stem the rising tide of government-employee strikes.

The real problem with the early attempts at adopting dispute-settlement techniques lay not so much with the techniques themselves as with uncountable other factors which aggravated the strike problem. Many of the programs were adopted hastily by lawmakers eager to do something about the problem, but unversed in the effectiveness of the dispute-settlement machinery they were setting up. Administration of the programs was haphazard in some jurisdictions, and managers attempting to make an "end run" around the plans created a greater risk of strikes. Many of the programs failed to treat the basic cause of public-sector strikes, namely the inequitable relationship in status, wages and benefits between the public employee and his private-sector counterpart.[31] Perhaps the greatest flaw in the new programs was that they were only as strong as the dispute-settlement machinery they incorporated, and that many of the techniques employed were ineffective.[32] While it was clear that the dispute-settlement procedures marked a good beginning in dealing with the strike problem, it was clear too that something more was needed.

Once again, the federal government took the lead and carved out a new approach to the concept of dispute settlement. In 1969, President Nixon replaced Kennedy's 1962 Order No. 10,988 with his own Executive Order No. 11,491.[33] The new order was a response to growing criticism of the 1962 program.[34] Executive Order No. 11,491 retained the shell of the Kennedy order, but it adopted a streamlined procedure for unit determination and recognition, a labor council to administer the program, a system of appeals to the Assistant Secretary of Labor, and a more detailed list of standards of conduct and unfair labor practices.[35] The 1969 order was received enthusiastically, and it appears to have

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[30]*See* Appendix, Table B.

[31]Sullivan, *How Can the Problem of the Public Employees Strike Be Resolved?*, 19 OKLA. L. REV. 365, 383 (1966). *See also* Sullivan, *Prevailing Wages for Public Employees*, 30 OHIO ST. L.J. 279 (1969).

[32]These are examined in greater detail in the latter part of this comment.

[33]3 C.F.R. 262 (1973).

[34]*See* Wray, *supra* note 23.

[35]*See* Wray, *Crisis in Labor Relations in the Federal Service: An Analysis of Labor-Management Relations in the Federal Service under Executive Order 11491*, 37 BKLYN. L. REV. 79 (1970).

effected a measure of success in averting strikes within the federal service.[36]

On the state level, many of the states which had enacted provisions for dispute settlement looked to ways of amending their statutes to cure their inherent problems. The result was that the states moved in the direction of integrated, unified, comprehensive programs specifically tailored to meet the states' needs. The new comprehensive programs have gone a step further than the dispute-settlement method. They provide avenues for dispute settlement, but they also provide for unified administration of every facet of the government-sector labor-management relationship. The comprehensive plans continue strike prohibition and allow collective bargaining. These new plans represent the most advanced and sophisticated measures yet arrived at for dealing with the public-employees strike question, and it appears that these programs have had, and will have, some success in helping to end government-employee strikes.[37] The inquiry in government-sector labor law has turned from how to stop the strike problem to how to make existing plans work. The recognized search now is for more effective means of dispute settlement.

II. Dispute-Settlement Techniques and Their Role in the Comprehensive Approach

Since the comprehensive approach has as its purpose the replacement of the strike weapon in the public sector with alternate avenues for resolving differences,[38] it is natural that dispute-settlement procedures would be at the very heart of the comprehensive program. The philosophy of the dispute-settlement technique is simply to attack the roots of strikes through quasi-judicial, negotiatory, and mediative means, thus averting strikes before they occur, rather than attempting to punish them once they do occur.[39]

Dispute-settlement techniques have had varied success, from total effectiveness to total failure and even to obstruction of the course of effective labor relations. Generally, however, it appears that dispute settlement works at its optimum when incorporated as part of a unified, structured approach to labor relations.[40]

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[36]*Id.* at 106.

[37]Advisory Commission on Intergovernmental Relations, *supra* note 21, at 27, 92.

[38]Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 Mich. L. Rev. 260, 302 (1968).

[39]*See* Goldberg, *Labor-Management Relations in the Public Service*, *supra* note 6.

[40]Advisory Commission on Intergovernmental Relations, *supra* note 21, at 92.

The most widely used mechanisms for dispute settlement are examined below. Some of them, such as the strike ban and use of political influence, are not true dispute-settlement techniques, but are often used after the impasse has hardened to force the other party either to negotiate or surrender. Many of the procedures discussed below are in use in some form in jurisdictions throughout the country.

The Complete Strike Ban. In one form or another, the complete prohibition of strikes by public employees has been the most widely used method of strike prevention in the public sector.[41] The complete strike ban was originally the child of the traditional approach to government-sector labor relations. The traditional viewpoint saw the government-employee strike as a strike against government itself, as defiance of the authority of the government.[42] Hence, the complete strike ban was implemented in order to assure that government employees did not challenge the sovereignty of the government through the strike. The strike prohibition has manifested itself at many levels. At common law, the courts upheld the traditional view and refused to recognize the right of public employees to strike.[43] Statutory enactments outlawing the government-employee strike have repeatedly found favor in the courts, despite a number of challenges.[44] The constitutionality of the complete strike ban was affirmed by the Supreme Court in *United Federal Postal Clerks v. Blount,*[45] a case in which the court stated, "Given the fact that there is no constitutional right to strike, it is not irrational or arbitrary for the Government to condition employment on a promise not to withhold labor collectively, and to prohibit strikes by those in public employment."[46]

The strike ban has found favor in most states. In fact, at present 19 states broadly prohibit all public employees from striking.[47] The strike ban has been applied in several contexts. It may be court-ordained, unsupported by any statute, as is the case in states which have no statutory law regulating public-sector labor relations.[48] The strike

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[41]*See generally* Comment, *The Strike and Its Alternatives in Public Employment,* 1966 WIS. L. REV. 549, 550-59.

[42]Board of Educ. v. Redding, 32 Ill. 2d 567, 207 N.E.2d 427, 430 (1965). *See* Howlett, *supra* note 12, at 111.

[43]Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482, 485 (1951).

[44]*See* Annot., 37 A.L.R.3d 1147, 1163 (1971).

[45]325 F. Supp. 879, 882 (D.C. 1971), *aff'd,* 404 U.S. 802 (1971).

[46]325 F. Supp. at 883.

[47]ABA SECTION OF LABOR RELATIONS LAW, II 1972 COMMITTEE REPORTS 267.

[48]Ten states apply the strike ban through application of the common law rule. Alabama, Alaska, Indiana, Iowa, Kentucky, Louisiana (except for one statute govern-

prohibition may be statutory, standing alone with no other legislation covering public-sector labor relations;[49] or the strike ban may act as the foundation of a comprehensive program.[50]

Strike bans are enforced most often through punitive measures. A typical example was New York's Condon-Wadlin Act[51] which sought to deter strikers with the threat of discharge, imprisonment, and a 3-year bar to further government employment. Courts have also granted injunctive relief in the face of government-employee strikes.[52] Courts have backed the injunction with their contempt power, and jail sentences for officers and employees of unions who defy injunctions have been meted out.[53]

Despite the fact that no state gives public employees at the state or local level an unqualified right to strike, the public-sector strike problem continues to escalate.[54] The strike ban, particularly where unaccompanied by other public-sector labor legislation, has proven inadequate to stop the burgeoning number of government-employee work stoppages.[55] As experience in public-sector labor relations becomes better established, it becomes clearer that the flat strike ban is not the answer to the government-employee strike.[56]

Unaccompanied by alternative methods of dispute resolution, a flat strike ban creates a severe imbalance of power at the bargaining table. With their strike weapon denied, and with no alternate means for exerting leverage on behalf of their demands, public employees have no other recourse than to submit their requests to their employer with the hope that he will accede to their demands. Such a situation makes a farce out of collective bargaining in the public sector. This problem, of course, does not apply where the strike ban is used to force the

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ing public transit workers), Mississippi, South Carolina, Tennessee and West Virginia. U.S. DEP'T OF LABOR, STATE PROFILES: CURRENT STATUS OF PUBLIC SECTOR LABOR RELATIONS 3, 5, 31, 33, 37, 39, 51, 83, 87, 99 (1971).

[49]VA. CODE ANN. §§ 40.1- 55 (Supp. 1973).

[50]WIS. STAT. ANN. § 111.84 (e) (Supp. 1973).

[51]N.Y. CIV. SERV. LAW § 108 (Repealed 1967).

[52]School Dist. v. Holland Educ. Ass'n, 380 Mich. 314, 157 N.W.2d 206 (1968). Courts have also given standing to third parties who apply for injunctive relief where a showing of irreparable damage if the strike occurs can be made. Air Transp. Ass'n v. Professional Air Traffic Controllers' Organization, 313 F. Supp. 181 (E.D.N.Y. 1970).

[53]Board of Educ. v. Kankakee Federation of Teachers, 264 N.E.2d 18, 22 (Ill. 1970). *See* Halligan, *Enjoining Public Employees' Strikes: Dealing with Recalcitrant Defendants*, 19 DE PAUL L. REV. 298 (1969).

[54]Thirty-six states were struck in 1968. ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, *supra* note 21, at 235.

[55]Zack, *Why Public Employees Strike*, 23 ARB. J. 69, 77 (1968).

[56]*Id.*

parties to use alternative methods of impasse resolution. But other problems plague the strike prohibition, whether it operates in a vacuum or hand-in-hand with other provisions.

The "martyr problem" has caused some thick problems in jurisdictions where strikers or their leaders are penalized by jail sentences. Rather than weakening the union, the jail sentence serves to strengthen the union's hand by arousing sympathy for the jailed strikers and effectively smothering voices of moderation within the union.[57] Even more thorny is the embarrassing situation that arises when union leaders are jailed, and then must be released so that bargaining to resolve the impasse can be continued.[58] Related to the martyr question is the possibility of sympathy strikes. Courts enforcing stiff penalties for walk-outs by one union may be faced with walk-outs by other public-employee unions. Thus, the court is put in the ridiculous position of provoking strikes while operating the machinery set up to stop strikes.

The gravest problem with strike bans, however, has proven to be the "amnesty strike." In this situation, government employees refuse to go back to work until they are granted amnesty for walking off the job.[59] When this happens, the strike ban law is dead. Instead of operating to deter the strike, the strike prohibition in this event becomes the union's primary vehicle for prolonging the strike and deepening the impasse. This occurred in New York in 1966, during the public transit workers' strike, and the effect was the legislative death of New York's Condon-Wadlin Act.[60]

Strike prohibitions are generally successfully defied, creating a corrosive effect on the law in general, and making the government appear impotent.[61] This is particularly true in the case of the so-called "disguised strike," a strike which comes in the form of "sick outs," resignations, "slow-downs," or other forms of work stoppages.[62] The public knows these are strikes, and labor and management know, but the work stoppage does not violate the statutory prohibition, and the government has to stand by while the public is inconvenienced.[63] The upshot of such a strike is that government is made to appear totally incapable of dealing with violators of its laws.

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[57]Kerman, *Strikes and Work Stoppages in the Public Sector,* 43 N.Y.S.B.J. 24, 41 (1971).

[58]*Id.*

[59]Zack, *supra* note 55.

[60]*Id.*

[61]*Id.*

[62]Nesvig, *The New Dimensions of the Strike Question,* 28 PUB. AD. REV. 126, 128 (1968).

[63]*Id.*

With the many problems of the strike ban, more and more commentators are suggesting that government employees be given a qualified right to strike. This qualified right is usually conditioned upon its being applicable only to "non-essential" services.[64] But a novel approach was taken by Montana in 1969, allowing strikes by nurses in private- and public-health-care facilities only if there is no strike at another health-care center within 150 miles.[65] The problem with the qualified-right approach lies in determining what services are essential and what services are not. But more importantly, the granting of the right to strike to government employees, even in a qualified way, is an admission by the government that government workers have the right to use the strike weapon. The danger is that the floodgates will be open, with public employees at every level demanding the right to strike.

While the strike ban has been extensively relied upon as a method of deterring and preventing public-service strikes, it is clear that this approach, particularly where used alone, is not effective in averting strikes. The strike ban is not an alternative to the strike problem. It offers no answer to the ticklish problems of the causes and roots of government-employees strikes. The strike prohibition is by its very nature an after-the-fact remedy; it attempts to punish strikes after they have already taken place. In this sense, the strike ban treats only the symptom, not the disease itself.

The strike must be prohibited in the public sector. The fact that public employers may not withdraw from the businesses they are engaged in, and that they must continue to provide services despite public-employee work stoppages, renders the strike a much too potent bargaining weapon in the realm of public-sector labor relations. Therefore, some form of strike prohibition must be continued in the government sector if bargaining power is not to be shifted completely to the advantage of public-employee unions.[66]

Given the necessity of the strike prohibition, and given its proven ineffectiveness, the question remains how to make the strike prohibition work. Experience has shown that making punitive measures more stringent does not make the strike ban more effective. In fact, such

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[64]*See* Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970); Foegen, *A Qualified Right to Strike—In the Public Interest*, 18 LAB. L.J. 90 (1967); Haemmel, *Government Employees and the Right to Strike—The Final Necessary Step*, 39 TENN. L. REV. 75 (1971).

[65]MONT. REV. CODES ANN. § 2209 (Supp. 1971).

[66]*See* Witt, *The Public Sector Strike: Dilemma of the Seventies*, 8 CALIF. WEST. L. REV. 108-09 (1971).

measures may exacerbate an already unstable situation.[67] And the strike ban has been shown to be particularly ineffective when operating alone, without alternative avenues of impasse resolution and dispute settlement.[68] The answer, therefore, seems to lie in making the strike ban part of a comprehensive approach to public-sector labor relations which equalizes the bargaining power on both sides of the table. In this way, the strike ban would operate to force public employees to bargain in good faith and with a requisite amount of bargaining power, while other provisions of the comprehensive program would force the public employer to the bargaining table.[69] Undoubtedly, this approach will not solve all the problems inherent in the strike ban. But hopefully, by providing alternate avenues of dispute settlement, the strike ban will become the last-ditch defense to the public-employee strike.

Application of Political Pressure. The use of political pressure by parties to public-sector negotiations is a natural outgrowth of the long-standing prohibition in the public sector of the use of economic weapons.[70] Some authorities see it as "in the nature of government that many of the solutions of public employee disputes are strongly influenced by political pressure rather than by direct economic action."[71] Others view it as undue influence on the political process.[72]

Political pressure assumes a number of forms. There is the lobbying approach, most often used by unions where no collective bargaining system or no workable system exists.[73] There is the government's technique of intervention by force, a favorite means of putting an end to public employee work stoppages.[74] And there is the "reasonable image approach," through which the parties subtly attempt to portray themselves as the ones with the truly righteous cause.[75]

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[67]Comment, *Collective Bargaining for Public Employees, supra* note 38, at 270.

[68]*See* Zack, *supra* note 55.

[69]This approach is used in a number of states. STATE PROFILES, *supra* note 48.

[70]*See* Comment, *The Strike and its Alternative, supra* note 41, at 560.

[71]Anderson, *Disputes Affecting Government Employees,* 10 LAB. L.J. 707, 710 (1959).

[72]Siegel & Kainen, *Political Forces Public Sector Collective Bargaining,* 21 CATH. U.L. REV. 581, 587 (1972).

[73]For a general discussion of the lobbying approach, *see id.* at 584.

[74]BUSINESS WEEK, June 17, 1967, at 122-24. Government intervention in the public-sector strike may take several forms. Government leaders may choose to replace strikers with Army or National Guard troops; or the intervention may arise as a plea to the legislature or Congress to pass emergency measures to halt the work stoppages. Another form of intervention is that in which the government threatens to take the matter into his own hands if the dispute is not settled.

[75]For a discussion of an application of the reasonable-image technique, *see* Raskin, *Politics Up-Ends the Bargaining Table* in PUBLIC WORKS AND PUBLIC UNIONS 122, 129-42, 144 (S. Zagoria ed. 1972).

Whatever form it takes, and whatever one's opinion of it, political pressure is clearly a limited tool for dispute settlement. It functions best only where procedures have not been instituted to resolve disputes at the bargaining level. Political pressure also does not comply with anyone's concept of meaningful collective bargaining. It tips the balance of power in negotiation radically in favor of government employees. If there is to be a workable system of public-sector collective bargaining, the use of political pressure must be eliminated through implementation of procedures making it possible for employees to be heard on their demands for better wages, working conditions, and grievance settlement.

Mediation. Twenty-five states have some provision for mediation of negotiation disputes,[76] and Executive Order No. 11,491 authorized its use in the federal sector. Some states permit mediation at the request of either party, while others require the request of both parties.[77] In several states, the public-employee relations board will intervene and force the parties to submit to mediation.[78] Mediation is viewed by many writers as the most successful method of dispute settlement.[79] Indeed, it has the advantages of lessening any imbalance of power in negotiation and improving communication so that bargaining can be accomplished over seemingly irreconcilable differences.

Operating outside of a comprehensive program of dispute settlement, however, mediation is at best a measure which expedites negotiation. It has no built-in mechanism for diminishing the strike threat other than that it helps negotiation succeed, thereby lessening the chances of strikes. And where it can only be obtained on a voluntary basis, it may never come into play. Where one party can force another reluctant party into mediation, the result may be the generation of hostility that can completely frustrate the entire purpose of mediation.[80] Most importantly, unions know that mediation is not as effective a tool of dispute settlement as the strike. In order to be effective, mediation must be required at a specified stage in negotiations, thus assuring that it will be used, and negating any feelings that the

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[76] U.S. Dep't of Labor, Dispute Settlement in the Public Sector, The State-of-the-Art 9 (1972). Mediation involves the introduction of a neutral third party into the negotiation process. The neutral party is neither a judge nor a referee, but rather a conciliator who improves the negotiation atmosphere by emphasizing the common ground between the parties and helping to tear down obstacles to communication.

[77] *Id.*

[78] Goldberg, *supra* note 6, at 55.

[79] Dispute Settlement in the Public Sector, *supra* note 76, at 57.

[80] *See* Comment, *Collective Bargaining for Public Employees, supra* note 38, at 277.

"other guy" has dragged a reluctant party into it.[81] In addition, the effectiveness of mediation is increased when it is part of a comprehensive program of procedures and policies intended to decrease public-employee strikes while treating their causes.

Fact Finding. Fact finding procedures are used by at least 23 states, and Executive Order No. 11,491 includes fact finding among its techniques for dispute settlement.[82] Fact finding is a form of advisory arbitration in which a neutral party, either invited in by the parties or directed in by statute, studies the facts upon which a dispute is based and states his findings as to what the real facts involved are.[83] The findings are not binding on the parties, and hearings may be had formally or informally.

Fact finding is a more final procedure than mediation. It arrives at a conclusion concerning the underlying causes of the stoppage,[84] it removes factual disputes from the way of real negotiation, and it may help solve impasses based on fact disputes that mediation could not solve. Fact finding has also proven to have an added bonus: published findings of the factfinder may turn public opinion against the recalcitrant party, forcing it to give in and resolve the impasse.[85]

Fact finding has the drawbacks of working slowly,[86] and being advisory only. It works best within a network of laws specially tailored to decrease the possibility of strikes in the public sector. Fact finding has proven to be an excellent means of resolving disputes in the public sector.

Unfair Labor Practice Proceedings. The National Labor Relations Act,[87] since its inception in 1935, has contained a number of proscribed practices for labor and management. A number of states have emulated the NLRA's example, and the federal government pursues the same course by Executive order.[88]

Unfair labor practice proceedings may generate some pressure to bargain in good faith, and may serve a useful publicity function, as does the factfinder's conclusions.[89] Such proceedings, however, are typically a time-consuming affair. Moreover, the typical provisions for

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[81] *Id.*

[82] DISPUTE SETTLEMENT IN THE PUBLIC SECTOR, *supra* note 76, at 10.

[83] *See* Comment, *Collective Bargaining for Public Employees, supra* note 38, at 277.

[84] Comment, *The Strike and its Alternatives, supra* note 41, at 566.

[85] *See* Comment, *Collective Bargaining for Public Employees, supra* note 38, at 277.

[86] *See* Stern, *supra* note 26, at 4.

[87] 29 U.S.C. § 141-97 (1970).

[88] Exec. Order No. 11,491, 3 C.F.R. 262 (1973). *See* ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, *supra* note 21, at 159-219.

[89] *See* Comment, *Collective Bargaining for Public Employees, supra* note 38, at 289.

unfair labor practice proceedings give the adjudicating body inadequate powers to enforce the finding of unfair practices or bad faith negotiation.[90]

The availability and enforceability, within a short time, of unfair labor practice standards, may be a useful tool in stopping some practices which aggravate the parties and cause negotiations to bog down. But this tool is, at best, only one in an arsenal of available strike-prevention and dispute-settlement techniques. Its possibilities as the cornerstone of a workable comprehensive plan must be recognized and explored.

Arbitration. Arbitration comes in a protean variety of forms. As a dispute-settlement technique, it has not been used as much as mediation and fact finding, although it has found special favor in the protective services.[91] Labor and management alike have been suspicious of arbitration's effectiveness. They believe that arbitration will not work, that it will subvert collective bargaining, and that it removes the power of the sovereign and places it in the hands of the arbitrator.[92] Despite the criticisms leveled at this procedure, 23 states have adopted acts directing arbitration of negotiation impasses.[93] And some authorities see arbitration as the most promising method of dispute settlement, and the method which can best handle the future labor-management relationship in the public service.[94]

There are two basic types of arbitration presently in use: grievance arbitration and interest arbitration. Grievance arbitration is a device for resolving disputes over the terms of an existing contract through the introduction of a third-party neutral who determines matters of interpretation.[95] This method of dispute settlement is available in both the public and private sectors, although it is much more prevalent in the private sector.[96] Grievance arbitration comes into play only after the

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[90] *Id.*

[91] DISPUTE SETTLEMENT IN THE PUBLIC SECTOR, *supra* note 76, at 60.

[92] *Id.*

[93] *Id.*

[94] *See* McKelvey, *Fact-Finding in Public Employment Disputes: Promise or Illusion?*, 22 IND. & LAB. REL. REV. 528, 530, 543 (1969). McKelvey predicted that "voluntary arbitration of impasses will gain acceptability and may well have a spill-over impact on the private sector." She points out that the Canadian experience has not borne out fears that arbitration will destroy collective bargaining or corrode the power of the sovereign. Her prognostications have been proved true by later events. *See* DISPUTE SETTLEMENT IN THE PUBLIC SECTOR, *supra* note 76, at 61.

[95] Comment, *Collective Bargaining for Public Employees, supra* note 38, at 280.

[96] Nineteen percent of public-sector agreements call for grievance procedures while 90 percent of private-sector agreements provide for grievance procedures. DISPUTE SETTLEMENT IN THE PUBLIC SECTOR, *supra* note 76, at 63.

negotiation process has been completed and a contract has been drawn up and agreed upon. It usually requires a finding of fact, intent or meaning, and it has no bearing on negotiation disputes.[97]

Interest arbitration is far less widespread than grievance arbitration, especially in the public service area.[98] Under this procedure, a third-party neutral is introduced into negotiations at the point of impasse. The neutral acts in a quasi-judicial capacity, eventually deciding the substantive terms of the new contract.[99] Interest arbitration zeroes in on the cause of the impasse, seeking to dissolve it before it ripens into a strike. Because most public work stoppages involve quarrels over contract provisions during negotiation, it appears that interest arbitration is a suitable means of preventing public-sector work stoppages.[100]

Interest arbitration comes in a wide assortment of forms. It may be compulsory or voluntary;[101] it may be binding or advisory;[102] and it may assume exotic configurations such as "final offer" arbitration[103] and mediation-arbitration.[104] Basically, however, arbitration is either compulsory or voluntary, with other variations falling within these principal divisions.

Voluntary arbitration is provided for by 17 states, five of these applying it only in limited situations.[105] As its name implies, voluntary arbitration is available at the request of the parties to a negotiation dispute; there is no legal compulsion to enter into the procedure. In many instances, voluntary arbitration is obtainable only at the request of both parties. But there are a number of variations on this basic pattern.[106] In the former case, the arbitration is truly voluntary. If both parties do not consent to participation, arbitration does not come about. Arbitration at the demand of one party is only partially voluntary, since, of course, one party comes voluntarily and one is compelled to follow. In either case, the decision in the voluntary arbitration jurisdiction is up to either both parties or one party. The

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[97]Schoenthal, *Collective Bargaining in the Public Sector: A Survey of Major Options,* 18 DRAKE L. REV. 26, 44-45 (1968).

[98]DISPUTE SETTLEMENT IN THE PUBLIC SECTOR, *supra* note 76, at 60.

[99]*Id.* at 60-61.

[100]*Id.* at 61.

[101]Sullivan, *supra* note 31, at 376-80.

[102]*Id.*

[103]Clark, *Public Employee Strikes: Some Proposed Solutions,* 23 LAB. L.J. 111, 119 (1972).

[104]Kagel & Kagel, *Using Two New Arbitration Techniques,* 95 MONTHLY LAB. REV. 11 (1972).

[105]DISPUTE SETTLEMENT IN THE PUBLIC SECTOR, *supra* note 76, at 12.

[106]*See id.*

attraction of the completely voluntary system lies in the fact that no one is forced to enter into arbitration; thus the resulting decision is more acceptable to the parties than would be a decision arrived at through a process forced on them by the law rather than by their choice.[107] Ironically, this same strength is the greatest weakness of the voluntary approach, since if the decision to enter into arbitration is left to the parties, they may never enter into arbitration, thus avoiding a swift solution to the impasse.

Voluntary arbitration may be binding or advisory. Voluntary binding arbitration is the type of arbitration most commonly used in the private sector.[108] It has, perhaps, the greatest potential for producing an amicable settlement of impasses. If an impasse is reached in negotiations, either party may institute arbitration of the issue which caused the impasse. The parties are then aware before they commit themselves to the procedure, that they will be bound by the arbitrator's decision. This method has been criticized as an unlawful delegation of legislative power.[109] But in states which have upheld this system, the results have been promising.[110] Voluntary advisory arbitration, on the other hand, is less satisfactory. In this arrangement, the parties may request arbitration of impasse-causing issues, and the arbitrator makes advisory recommendations for the resolution of the impasse.[111] This procedure is sometimes loosely referred to as fact finding, but the two procedures are easily distinguishable since advisory arbitration results in recommendations for the resolution of the impasse while fact finding culminates only in interpretations of facts and a resulting decision as to which party is right, with no recommendations as to modes of compromise or other means of impasse resolution. Voluntary advisory arbitration does not give rise to the objection that the state is illegally delegating its legislative authority because no resolution is compelled, only a recommendation is produced. And it has the further feature of mobilizing public opinion in favor of the party for whom the arbitrator finds, thus promoting a speedy resolution.[112] The distinct disadvantage of voluntary advisory arbitration is that it may result in no solution to the impasse at all. The decision is left completely to the parties as to whether they will arbitrate, and the end

[107]Zagoria, *The Future of Collective Bargaining in Government* in PUBLIC WORKERS AND PUBLIC UNIONS 160-169 (S. Zagoria ed. 1972).

[108]*Id.* at 379.

[109]Fellows v. La Tronica, 151 Colo. 300, 377 P.2d 547, 550 (1962).

[110]*See* Gerstenfeld, *Compulsory Arbitration Is Ready When You Are,* 23 LAB. L.J. 153, 155 (1972).

[111]Sullivan, *supra* note 31, at 377.

[112]*Id.*

result of the ritual may be no solution at all since neither side is legally obligated to abide by the decision of the arbitrator.[113] It is certainly questionable whether a system that leaves so much to the good will of the parties to a highly-charged, often delicate, situation is worthwhile.

Compulsory arbitration is applied by a number of states.[114] Almost every state applying this system provides that arbitration be executed by a panel or a board rather than by an individual.[115] In compulsory advisory arbitration, the parties are forced to enter into arbitration, but the results are not binding. Here, the advantage is that the parties are forced to make their positions public, and unreasonable positions cannot be hidden.[116] But here, as in voluntary advisory arbitration, the results may be more transparent than substantial if public opinion is not sufficient to dislodge one party from an obstinately held position.

Compulsory binding arbitration takes the collective bargaining process out of the hands of labor and management and puts it under control of a third party.[117] "This negates collective bargaining, and places the arbitrator in the position of regulating wages, hours, and other terms and conditions of employment in the public sector."[118] The obvious advantage of this no-nonsense approach is that impasses can be quickly dissolved at the order of the arbitrator. Moreover, where the impact is massive, his opinion may settle the terms of the entire contract. Equally obvious are the disadvantages. Collective bargaining is for all intents and purposes put to death for the parties to the negotiation and reincarnated in the arbitrator. And the practical matter of forcing parties to accept a decision they had no hand in reaching and by which they are legally bound, is no simple consideration. Compulsory binding arbitration is the least desirable form of compulsory arbitration.

In spite of the drawbacks of the compulsory approach to arbitration, there is a growing interest in it as a practicable replacement for the strike. Jurisdictions interested in adopting techniques of dispute settlement are becoming increasingly enamored of the compulsory arbitration approach because of its ability to be interposed at a critical point in negotiations to assure resolution of impasses.[119] But the com-

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113 *Id.*

114 DISPUTE SETTLEMENT IN THE PUBLIC SECTOR, *supra* note 76, at 13.

115 *Id.*

116 Sullivan, *supra* note 31, at 377.

117 *See* Clark, *supra* note 103, at 118.

118 Sullivan, *supra* note 31, at 379.

119 DISPUTE SETTLEMENT IN THE PUBLIC SECTOR, *supra* note 76, at 13.

pulsory arbitration concept has drawn a salvo of legal challenges.[120] In Michigan, Pennsylvania, Rhode Island, and Wyoming, courts have upheld such provisions.[121] But other jurisdictions attempting to enact similar statutes may expect legal attacks due to no ascertainable standard for the decision of the arbitrator, invalid delegation of legislative authority, and unconstitutionality.[122]

Mediation-arbitration, a hybrid form of dispute resolution, has been proposed as an alternative to the pitfalls created by voluntary and compulsory arbitration.[123] Med-arb, as it is referred to by its proponents, is a voluntary process where the mediator-arbitrator actually becomes a party to the negotiations. He acts in a dual capacity. While acting as mediator, he holds in reserve his power as arbitrator, giving him extra muscle unavailable to the ordinary mediator.[124] When an impasse develops, and his mediator role no longer is capable of controlling the situation, the arbitrator assumes control. In effect, the parties must then convince him of the reasonableness of their respective positions before he is willing to resolve the dispute in their favor.[125] Advocates of this schizophrenic arrangement claim that the burden falls on the parties to assume a reasonable posture in negotiation, and that the arm's length relationship necessary for mediation and the semi-legal stance required by arbitration can be dispensed with.[126] The flaws in the med-arb technique are multiple. It has all the disadvantages of the voluntary arbitration approach. In addition, any advantage to be gained by eliminating the arm's length character of the mediation relationship and the semi-legal nature of arbitration would surely be less desirable than the advantage of using completely neutral third parties, uninvolved in the bargaining relationship and unsusceptible to the charge of being open to the cajolery, bribery, or overtures of the parties. The med-arb method has been used to a degree in private industry on the West Coast.[127] It has not, however, been utilized in public-sector contracts.

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[120]*See generally id.* at 12-14, 60-61.

[121]Dearborn Firefighter Union v. City of Dearborn, 323 Mich. 414, 35 N.W.2d 366 (1949); Harney v. Russo, 435 Pa. 183, 255 A.2d 650 (1969); City of Warwick v. Warwick Regular Firefighters' Ass'n, 106 R.I. 109, 256 A.2d 206 (1969); Firefighters Local 946 v. City of Laramie, 437 P.2d 295 (Wyo. 1968).

[122]Dispute Settlement in the Public Sector, *supra* note 76, 13-14 and discussion of cases note 121 *supra*.

[123]Kagel & Kagel, *supra* note 104.

[124]*Id.* at 12.

[125]*Id.*

[126]*Id.*

[127]*Id.*

"Last-offer" arbitration is a controversial concept. It was incorporated in President Nixon's proposals for regulation of the trucking industry, and it has been greeted by labor law scholars with mixed emotions.[128] Supporters of this plan urge it as a substitute for the compulsory arbitration procedure.[129] Under the last-offer arrangement, when all other measures have failed, the parties are directed to submit their final acceptable offers to the arbitrator, who will decide which one is more reasonable and order implementation of that offer.[130] This method is claimed to be extremely helpful in forcing the parties to assume reasonable positions in negotiation, since failure to do so may result in the arbitrator choosing to enforce the final offer of the opposing side.[131] Critics of this form of arbitration for the most part claim that the competing parties might be tempted to adopt extreme or unreasonable positions in order to get the most out of the decision should it go their way.[132] In such an event, the arbitrator would be forced to select the less unreasonable of two totally unreasonable proposals.[133] Proponents of this approach dismiss this possibility, noting that the likelihood of both parties adopting unreasonable stances is remote, since the incentive in the system is to assume a reasonable posture; the party who does, gets rewarded, so logically, the parties would vie with each other to take the more reasonable position.[134] In addition, this technique used in conjunction with fact-finding or advisory arbitration would greatly lessen the probability of either party's taking an unreasonable position.

Arbitration has a bright future in the area of public-sector labor relations. It has the attraction of injecting a neutral third party into the negotiations at a point where no further negotiation is possible. If the questions of whether the arbitrator's role is an invalid delegation of legislative power and whether arbitration breeds over-reliance on dispute settlement to the detriment of negotiation can be answered, it may begin to assume an important position in public-sector labor law. Also, the inherent weaknesses of arbitration may be remedied by its incorporation in a comprehensive plan. But arbitration must be considered in light of the dilemma now facing government labor law, that is, to replace the strike with alternate acceptable means of impasse resolution. Until the weaknesses of arbitration are cured or compensated

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[128]Clark, *supra* note 103, at 119.

[129]*Id.*

[130]*Id.*

[131]*Id.* at 120.

[132]Clark, *supra* note 103, at 120.

[133]*Id.*

[134]*Id.*

for by accompanying provisions in a comprehensive program, it will remain unacceptable to public-sector labor negotiators, and it will remain the "weak sister" among dispute-settlement techniques.

Mixed Plans. Among the jurisdictions which have begun to make use of dispute techniques, only a handful make only one method available to public-sector negotiators.[135] Most governments prefer to give the parties some alternatives to fall back on if one dispute resolution technique fails. An example of such a "mixed plan" is found in Maine, where impasses may be resolved through mediation, fact finding, binding arbitration, or advisory arbitration for specific issues.[136] Other jurisdictions make more or fewer avenues available, and the variation within dispute-settlement techniques currently in use, in terms of which public employees are covered, when the method becomes available, who administers it, whether it is binding, is virtually endless. Mixed plans range from highly effective to ineffective, depending on the strength of the resolution methods used and the administration of the program incorporating these methods.[137] Some mixed plans are nothing more than rudimentary aid-to-bargaining provisions,[138] while others are almost comprehensive in scope.[139] In each case, the dispute resolution machinery is designed to meet the particular needs of the level of government involved.

Whatever plan the lawmakers choose, the role of the dispute-settlement technique in public-sector labor relations must be kept in mind. The dispute-settlement procedure will only be effective to the extent that it acts as a practicable quid pro quo for the employees' right to strike. Otherwise, the dispute-settlement mechanism will amount to nothing more than an exercise in human relations, because employees will relinquish their right to strike only to the extent that they are given other workable means for forcing management to consider their demands. Dispute settlement alone is not the key to a beginning of the end to government-employee strikes. Dispute settlement which

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[135]Alaska, California, Florida, Georgia, Iowa, Louisiana, Missouri, North Dakota, and Oklahoma are the only states to provide only one dispute-settlement technique. DISPUTE SETTLEMENT IN THE PUBLIC SECTOR, *supra* note 76, at 26-27.

[136]STATE PROFILES, *supra* note 48, at 41.

[137]*See generally* Shaw, *The Development of State and Federal Laws* in PUBLIC WORKERS AND PUBLIC UNIONS 20-36 (S. Zagoria ed. 1972).

[138]Texas, for example, provides only that school boards may consult with teachers regarding matters of educational policy and employment. TEXAS EDUC. CODE § 13.901 (1969). Another provision permits municipal governments in cities with a population of more than 10,000 to set up dues check-off programs for city employees. TEXAS REV. CIV. STAT. ANN. art. 6252-3a (1970).

[139]*See, e.g.*, WIS. STAT. ANN. §§ 111.70, .80-.94 (Supp. 1973).

provides a procedure acceptable to labor and management alike for breaking negotiation logjams and which gives public employees an acceptable alternative to the right to strike may be the key. This use of dispute-settlement machinery is precisely the goal of the comprehensive approach.

III. New Directions for the Comprehensive Approach

While many states in the 1960's moved toward adopting public-sector labor relations programs which incorporated various dispute-settlement techniques, other states went a step further and began to build truly comprehensive policies.[140] The comprehensive approach represents a refinement of the philosophy that labor disputes in the public sector can best be prevented from culminating in strikes if dispute-settlement procedures rather than the traditional punitive-deterrent approach is used.[141] The truly comprehensive program seeks to combine the best elements of proven dispute-settlement techniques in a matrix of regulations that cover every aspect of the government-government employee relationship.[142] The genuinely comprehensive program is a considered, thought-out, balanced approach, replacing ad hoc and patchwork programs with a unified system of dispute settlement and balanced collective bargaining.

The comprehensive approach has the distinct advantage of being tailored specifically to meet the particular problems of labor relations in the public sector. The well-planned comprehensive act evidences a commitment on the part of government to securing tranquility in public employment. If properly planned, it can provide a smooth, unified mechanism for negotiation and impasse resolution in the public sector.[143] The statutory comprehensive plan has the further advantage of being subjected to periodic review by the legislature, a process that can result in amendments being made to meet changing conditions. Overall, the comprehensive approach should result in greater interest at all levels of government in dealing with the problems of public-sector labor relations.

Some problems may accompany attempts to set up comprehensive programs. Funding will be a major question.[144] In order to set up a

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[140]Klaus, *supra* note 14, at 2.

[141]*See* Comment, *Collective Bargaining for Public Employees, supra* note 38, at 302.

[142]Clark, *supra* note 103, at 120.

[143]*See* Advisory Commission on Intergovernmental Relations, *supra* note 21, at 103-04.

[144]Lev, *Strikes by Government Employees: Problems and Solutions,* 57 A.B.A.J. 773 (1971).

workable, unified system of controls over labor relations in government, an administrative body will have to be formed. This body would have to oversee the workings of the comprehensive act to assure its effectiveness, and such an agency would incur large costs in time, men, and materials. The people must be willing to bear the expense of the program before it can be enacted. This raises a related issue: will the people see the administrative body as actually necessary, or as just one more layer on the bureaucratic cake? Whether the administrative body is designed to bask in red tape or to contribute to the smooth functioning of the comprehensive program may mean the difference between public acceptance and rejection of the comprehensive approach. But the most perplexing question arising over the comprehensive approach is the problem of how extensive to make the comprehensive acts.[145] One of the primary goals of the comprehensive philosophy is to eliminate the bewildering profusion of stop-gap, patchwork measures.[146] The boundaries of this problem are enormous. Each state takes its own course in dealing with government-sector labor relations. And within each state, counties and municipalities enact provisions to govern the labor-management relationship in the public sector. The result is a mass of uncoordinated, confusing policies and programs, varying widely not only from state to state, but also within each state.[147] The question comes up, then, how best to eliminate the confusion? Several avenues are available. The comprehensive approach can be implemented on a state-by-state basis, each state adopting a comprehensive plan it believes will solve its particular problems. This is the route the states seem to be taking now, with a few states pursuing comprehensive plans.[148] This approach leaves wide latitude for variation between states, doing nothing to hurdle the problems created by a patchwork policy lacking any unified direction. Another alternative is for the states to adopt comprehensive programs in the form of a uniform law similar to the Uniform Commercial Code or other like statutes. Once again, however, if states choose not to embrace the uniform policy, or if they do enact it only after massive amendment, then the goal of a

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[145] *See* Schoenthal, *supra* note 97, at 33-37.

[146] Comment, *Collective Bargaining for Public Employees, supra* note 38, at 289.

[147] As pointed out above, state programs vary from non-existent (as in those states which rely entirely on a judicially created and enforced strike ban, *supra* note 48), to programs approaching a comprehensive scope eq. (such as Wisconsin's WIS. STAT. ANN. §§ 111.70, .80-.94 (Supp. 1972)). Programs within states also vary, with some states having different legislative programs for different groups of public employees. *Compare* CAL. EDUC. CODE §§ 13080-88 (West 1968), *with* CAL. GOV'T CODE § 3500-3511 (West 1968).

[148] ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 21, at 27.

uniform policy has been thwarted. Perhaps the answer lies in adopting a federal program to oversee the workings of the labor-management relationship at every level of government.[149] Despite the intricacies of the federal system, there does not seem to be any insurmountable constitutional barrier to federal participation in the employee problems of local and state governments.[150] Moreover, the federal government has the financial capacity to fund a network of administrative agencies and bargaining assistance services necessary to produce an effective comprehensive program. The federal act concept also would eliminate the confusing and perplexing network of laws, attorneys' general opinions, Executive orders, and municipal ordinances that now characterize public-sector labor law.

To be sure, there are some reservations about the federal approach. Politicians and their constituents are becoming more adamantly opposed to further federal intrusion into what thely feel is the states' realm of power, and the federal monolith appears to be nearing its twilight as the accepted mode of operating the American federal system. Thus it seems inopportune to expect that Congress and the President would consider expedient another federal agency to be heaped upon the numberless others already in existence. It is just as unseasonable to expect that Congress and the executive branch would endorse expenditures to finance such an undertaking, particularly in light of the furious tug-of-war over spending currently raging in Washington. Nor does it appear that any of these questions could be resolved by making the National Labor Relations Act applicable to government employers and employees. The political objections would still be present, and the additional problem of the inapplicability of the private-sector experience to the public sector would arise, although appropriate amendments to the act could remedy this defect.[151]

None of these problems present insurmountable obstacles to implementing a unified, comprehensive program for government-sector labor relations. Government has shown a remarkable aptitude for overcoming what are apparently the most insuperable constitutional, poli-

[149]Lev, *supra* note 144.

[150]*Id.* at 771. Lev observes that, while the Taft-Hartley Act excludes public employees and agencies from its coverage, one case, Plumbers, Steamfitters, Refrigeration, Petroleum Fitters, and Apprentices of Local 298 v. County of Door, 359 U.S. 354 (1959), has construed the term "person" within the act to include public bodies, thereby laying to rest constitutional objections to exclusion of public agencies and state and local government from coverage in this act or a similar federal enactment.

[151]*See generally* Witt, *The Public Sector Strike: Dilemma of the Seventies,* 8 CALIF. WEST. L. REV. 102, 108 (1971).

tical, and economic hurdles in dealing with serious social problems, and the problem of government-sector strikes, growing greater every year, is certainly a serious social problem.[152] The alternatives are either to accept the rising tide of public strikes or do something effective about it. At this time, the most promising solution lies in the comprehensive approach, whether adopted state-by-state, on a uniform basis, or as part of a federal program.

If one lesson of the government-sector labor relations experience stands as the most valuable to future public-sector labor relations, it is the lesson that hastily enacted measures meant to secure some measure of tranquility in the public sector have more often than not failed in their purpose.[153] Instead, such unplanned, patchwork programs, with no direction and no place in an overall scheme of government labor law, have operated as barriers to peaceful government labor relations. Necessarily then, in order to avoid the pitfalls too often encountered by other approaches, the comprehensive program will have to be based on well-considered grounds of public policy and the need for a program that will stand up to labor problems today as well as tomorrow. Several fundamental problems will have to be confronted and resolved before the comprehensive approach can be most effectively embodied in a government-sector labor relations policy. If the comprehensive approach will seek to replace the strike weapon with other modes of dispute settlement, what will force the parties to the bargaining table? Good faith bargaining is a fine ideal, but it is a bond of questionable strength in bringing about genuine, workable labor relations in the public sector. There must be some lever, whether in the form of statute, economic weapon, or other tool, to enforce good faith bargaining. It will not simply evolve on its own. Another problem is that of recognition and representation. The intricacies of unit determination and elections will have to be considered in formulating a comprehensive program.[154] The scope of bargaining will have to be demarcated before a comprehensive strategy can be mapped. A somewhat related problem is that of the role of the legislative bodies in the comprehensive plan. Just how willing will Congress and state and local lawmaking groups be to delegate their power over contractual terms and other aspects of the government labor-management relationship?[155] A further question that must be resolved prior to any satisfactory compre-

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[152]Lev *supra* note 144.

[153]*See* Clark, *supra* note 103, at 112.

[154]*See* Newland, *Collective Bargaining Concepts: Application in Government*, 28 PUB. AD. REV. 117, 121 (1968).

[155]Zack, *supra* note 55, at 80.

hensive enactment is the question of how to arrive at the most equitable wage rate for public employees. Is the prevailing wage concept, by which government employees are given pay at a rate comparable to private-sector employees doing similar work, the most effective answer? Or must government employees be governed by a different standard in arriving at a reasonable pay rate?[156] None of these questions can be left unanswered if the comprehensive approach is to have any real effect in resolving the growing public-strike problem. Scholars and commentators have debated these issues, and the discussion continues, but no consensus has been reached, and indeed, none is in sight.[157] Rather, it appears that there will be much more deliberation before any permanent answers can be reached.

Despite the lack of agreement over the resolution of the basic questions facing the establishment of the comprehensive approach, authorities have arrived at some broadly accepted conclusions concerning the elements necessary for a workable comprehensive program.[158] Generally, advocates of the comprehensive approach cite the need for the use of sanctions to encourage bargaining, aids to bargaining, and the administration of a unified, comprehensive policy by a body set up specifically for that purpose.[159]

The use of sanctions to foster bargaining is, of course, the traditional method of coping with the public-employee work-stoppage issue. Used in conjunction with other modes of dispute resolution, however, sanctions may provide the key to the knotty problem of forcing the parties to negotiate when the strike weapon is removed.[160] In fact, sanctions may be the only workable means of prompting the parties to bargain, and until something obstensibly better comes along, sanctions may be the ultimate spur to good faith negotiation. A strike ban, for instance, could balance bargaining power while producing some peace in public-sector

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[156]Sullivan, *supra* note 31.

[157]*See, e.g.*, Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943 (1969); Krinsky, *Avoiding Public Strikes — Lessons from Recent Strike Activity*, 21 LAB. L.J. 464 (1970); Pollelle, *Collective Bargaining in the Public Sector: Coherence or Chaos?*, 48 N.D.L. REV. 41 (1971); Ross, *Public Employee Unions and the Right to Strike*, 92 MONTHLY LAB. REV. 14 (March 1969); Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969).

[158]*See, e.g.*, ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 21, at 93-113; Clark, *supra* note 103, at 120; Comment, *Collective Bargaining for Public Employees*, *supra* note 38, at 302.

[159]*See*, Comment, *Collective Bargaining for Public Employees*, *supra* note 38, at 289-95, 297-301.

[160]*See id.* at 292-97.

relations.[161] In addition, the accompanying penalties would operate to avoid strikes. But the strike prohibition must be used carefully and applied uniformly if the corrosive problems of amnesty strikes and flaunting of judicial power are to be avoided.[162] The injunction may play an important role in the comprehensive approach. Although its cumbersome and time consuming nature renders it a less than satisfactory tool for enforcing bargaining, the injunction could be made available to or denied management to compel good faith bargaining.[163] Unfair labor practice standards and procedures could, if swiftly and surely enforced, and if made applicable to labor as well as management, provide an equitable means of compelling parties to bargain while preserving the relative equality of bargaining positions.[164] Perhaps a combination of the strike ban, the injunction, and the unfair labor practice proceeding could produce a suitable atmosphere for genuine bargaining in the public sector. Whatever sanctions are incorporated in the comprehensive approach, they must be adopted with an eye toward keeping the position of the parties at the bargaining table in some form of equilibrium. Only in this way can good faith bargaining be expected to come about in the public sector.

Authorities also advocate the use of bargaining aids in the comprehensive program to foster good faith public-sector labor negotiations.[165] With the right to strike barred by the comprehensive approach, other techniques must be available in order to dissolve obstructions caused by bargaining impasses and bad faith bargaining. Operating within the ambit of the comprehensive program, techniques such as arbitration, mediation, fact finding, and similar methods can promote smoothness in negotiation and help expedite the settlement of problems that appear insurmountable.[166] Moreover, bargaining aids, used in conjunction with other aspects of a comprehensive plan, can do much to equalize the bargaining relationship and help avert work stoppages. In order to be effective, bargaining aids must be applicable swiftly and either mandatorily or at the demand of either party. Otherwise, administrative delays and haggling over whether to use bargaining aids could choke the negotiation process, stymieing the very purpose for which the aids are meant. Bar-

[161]Debate continues over the question of whether public employees should have the right to strike. *Compare* Burton, *Can Public Employees Be Given the Right to Strike?*, 21 LAB. L.J. 472 (1970), *with* Bers, *The Right to Strike in the Public Sector*, 21 LAB. L.J. 482 (1970).

[162]These problems are discussed more fully in the latter part of this paper.

[163]Comment, *Collective Bargaining for Public Employees*, *supra* note 38, at 296-97.

[164]*See id.* at 288-89.

[165]Clark, *supra* note 103, at 120.

[166]These bargaining aids were discussed more fully in the latter part of this paper.

gaining aids are, of course, only one facet of the comprehensive program. Their role in the comprehensive approach is not primarily to foster bargaining, as is the case in private industry. On the contrary, bargaining aids in the comprehensive program attempt to provide alternative avenues of dispute settlement, thus avoiding strikes. Bargaining aids in the public-sector labor relationship can only be effective when applied as part of an integrated, comprehensive program which aims ultimately at reducing the number of public-employee strikes while avoiding an excessive tax burden.[167]

Comprehensive programs will require some from of administrative bodies to manage their various provisions. Preferably, the administrative groups should have jurisdiction over every phase of the comprehensive acts, and should consist of well-organized, clearly defined, permanent neutral bodies.[168] Any other approach to management of comprehensive programs could result in a proliferation of bureaus, offices, and departments, all with conflicting and overlapping duties and jurisdiction. The most desirable mode of administration would be to establish a body with broad power to control the program, having within its structure specialized groups to handle matters such as arbitration and bargaining aids, administration of the strike prohibition and unfair labor practice proceedings, and the business of assuring the smooth operation of the program. Such an approach has worked reasonably well with the National Labor Relations Act, and Wisconsin has achieved satisfactory results with a similar set-up.[169] Regardless of whether the comprehensive approach is adopted state-by-state or on the federal level, an administrative body with wide control over each enacted program should be established. Only in this way can the integrated, unified thrust of the comprehensive plan be preserved.

Various minor elements, including the elimination of conflicting statutes and giving the parties to the negotiations the power to determine the terms of the contract, must be included in any comprehensive plan. In fact, adoption of the comprehensive approach will require a great deal of study and legislative drafting, with close attention to miniscule details. But the hope of the proponents of the comprehensive approach is that the combination of barring public-employee strike activity with alternate avenues of dispute resolution, unifying administration of the program, and allowing the parties to tailor contract terms to fit their own unique

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[167]*See* Comment, *supra* note 38, at 302.

[168]*See generally,* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 21, at 104-05.

[169]Stern, *supra* note 26.

situation, will result in an ultimate end to the government-sector strike problem.[170]

Despite the fact that the comprehensive philosophy is one of the most innovative approaches to public labor relations in the history of this country, and despite its potential for bringing peace to this troubled area, relatively few jurisdictions have adopted a truly comprehensive program.[171] There have been attempts to enact comprehensive plans, notably Wisconsin's Public Employee Relations Act[172] and Federal Executive Order No. 11,491.[173] None of the existing programs, however, have yet laid to rest the basic questions discussed above which need to be answered before a genuine comprehensive plan can be enacted, and none of the existing programs have freed themselves sufficiently of minor malfunctions to be able to claim full effectiveness.[174] Some of the public-sector labor relations acts are more "comprehensive" than others. They range from programs which make provision for some form of dispute settlement[175] to programs which embrace almost every particular of the labor-management relationship.[176] But whether the act is fully comprehensive or not, its part in the overall trend of government labor law is clear: the direction of the law is toward the comprehensive approach.[177] The record of dispute settlement in New York City, New York State, Michigan, Wisconsin, Connecticut, Massachusetts, and other jurisdictions which have adopted comprehensive or partially comprehensive programs is impressive.[178] Ultimately other jurisdictions, confronted with the rising tide of public strikes and unable to handle the situation with existing laws, will turn toward comprehensive policies.

There is some good news and some bad news for jurisdictions searching for model comprehensive plans. The good news is that the available plans are excellent. The bad news is that there are few available plans. There are a number of proposed comprehensive programs, extending from the practicable to the impossible.[179] The number of enacted pro-

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[170]Clark, *supra* note 103, at 120.

[171]*See* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 21, at 92.

[172]WIS. STAT. ANN. §§ 111.80-.97 (Supp. 1973).

[173]3 C.F.R. 861 (1973).

[174]ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 21, at 92.

[175]PA. STAT. ANN. tit. 43, §§ 217.1-.10 (Supp. 1973).

[176]MICH. COMP. LAWS. ANN. §§ 423.201-.254 (1967).

[177]ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 21, at 27.

[178]DISPUTE SETTLEMENT IN THE PUBLIC SECTOR, *supra* note 76, at 62; Anderson, *supra* note 157, at 964.

[179]*See* Kerman, *supra* note 57, at 34-39.

grams is much fewer.[180] A survey of the available plans reveals extensive consensus in the inclusion of the basic elements of the comprehensive approach noted above. At the same time, however, there is widespread disagreement over details.

Arvid Anderson, a leading authority in the field of public-sector labor relations law, posits that a fully comprehensive statute, with every available precaution for preventing strikes, is the most advantageous means of governing the government-labor relationship. He relies on fact finding as the most effective means of dispute resolution. Anderson sees the comprehensive plan as an all encompassing enactment, with courts, legislature, and executive branch participating in its formulation. He urges as the alternative to the strike (1) continuation of the strike ban, (2) a not overly centralized administrative body, and (3) fact finding.[181]

George Taylor, author of New York's Taylor Law,[182] couches his call for a comprehensive program in terms of a choice between more strikes or procedures. Taylor questions the need for an absolute strike ban, but admits the need for a strike prohibition as the heart of a comprehensive approach. He completely rejects the idea of compulsory arbitration, and suggests instead that the parties first attempt to formulate their own procedures for dealing with impasses. If this fails, Taylor recommends a graduated participation in the dispute by the administrative body, ranging from mediation to fact finding to a show-cause hearing before a legislative panel.[183]

Thea Kerman, in a thoughtful article in the New York State Bar Journal, advocates a similar mode of dispute settlement, but with the added proposal that public employees be given at least a partial right to strike. Only in this way, the author believes, can collective bargaining in the public sector be enforced and made workable.[184]

Wellington and Winter, co-authors of numerous articles dealing with the government-labor relationship, propose a structured program with a strike prohibition, and methods of dispute resolution. But the authors propose that the plan be adopted in three different forms in separate jurisdictions to test its effectiveness. They suggest first a plan whereby multi-party negotiation could take place, with the aim of reaching a formal agreement that would accomodate the interests of those

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[180]*See* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 21, at 100.

[181]*See* Anderson, *supra* note 157, at 964-70.

[182]N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1973).

[183]Taylor, *Public Employment Fact Finding Procedure,* 20 IND. & LAB. REL. REV. 617, 633 (1967).

[184]Kerman, *supra* note 57, at 40-41.

principally concerned. Wellington and Winter see this arrangement as particularly suitable for decentralized school districts, in which negotiation could take place among teachers, school management, and the most affected portion of the community.[185] Second, the authors recommend a system of negotiation in which bargaining would transpire between labor and management, with the possibility that a third-party neutral could intervene if petitioned to do so by a stipulated percentage of the community affected. In addition, the affected members of the community would have the opportunity to hold a referendum on provisions of the contract they find questionable.[186] While these two approaches rely on political impact to resolve bargaining issues, the authors' third proposal takes a different tack. The third proposal suggests a comprehensive state statute covering traditional subject matters of bargaining. The statute would incorporate the features set out above as those usually found in a comprehensive program, but there would be provision for a standing citizens' commission to make proposals to the legislature for specific enactments to permit enlargement of the subject matter of bargaining when an appropriate situation arises.[187] In this way, special circumstances and public opinion could be accomodated. Wellington and Winter's three proposals work within the framework of the comprehensive philosophy, but they have as their underlying character the injection of public opinion into the negotiation process, and the use of third parties.

Edward Lev favors a federal comprehensive program. He advocates continuation of the strike ban in combination with dispute settlement principally through mediation, and a federal administrative body. Lev submits that this program could be enacted as a federal statute under the management of a federal agency. The program would be open to participation by any government agency at any level. In return for federal funds and other assistance in running their programs, participating public bodies would have to comply with the requirements of the statute, which basically would include 29 minimum requirements for public contracts, immediate elections, good faith bargaining, and acceptance of mediator's findings. Lev's position is that the growing public-strike problem will only be stopped through federal assistance.[188]

The Advisory Commission on Intergovernmental Relations also has proffered a model comprehensive program. The ACIR plan assures that "strikes are banned, but a wide range of formal devices to resolve dis-

[185]Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 868-69 (1970).

[186]*Id.* at 869-70.

[187]*Id.* at 870.

[188]Lev, *supra* note 144.

agreements is mandated."[189] This model statute is meant to be enacted on a state-by-state basis. It provides for recognition, election, and certification. It makes provision for variation among jurisdictions to meet exigencies arising because of local differences and special considerations. The ACIR program is the closest existing proposal to a uniform act.

Although much imagination has been brought to bear on the subject of comprehensive acts, only a relatively few jurisdictions currently operate under comprehensive or nearly comprehensive plans. Two outstanding examples are Wisconsin and the federal government. The Wisconsin Act, first enacted in 1962 and later amended several times, provides for a state commission to govern the state-state employee relationship, recognition, bargaining, a set of standards of fair conduct for labor and employer, and a procedure for dispute settlement relying primarily on fact finding, but also incorporating arbitration and mediation.[190] The Wisconsin Act includes a strike ban and a detailed provision for unit determination.[191] The Wisconsin approach is not a genuine comprehensive act, since it makes different provisions for state and municipal employees in different statutes.[192] A better approach would be to adopt a unified, integrated act, designed to govern the public-employment relationship at every level and under one administrative roof.[193] But other states, including Connecticut, New York, Maine, and Michigan have followed Wisconsin's lead.[194]

The federal government's entry into the arena of the comprehensive program came in 1962 with President Kennedy's Executive Order No. 10,988.[195] The 1962 pronouncement proved inadequate to stem the rising tide of public-employee strikes, so it was amended in 1969 by President Nixon's Executive Order No. 11,491.[196] The 1969 amendments have been remarkably effective in slicing the number of government-employee work stoppages at the federal level. In sum, the federal program is one of the most comprehensive in existence. It applies to almost all agencies of the federal government except for intelligence and investigative em-

189ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, ACIR STATE LEGISLATIVE PROGRAM 71-98 (1972).

190WIS. STAT. ANN. § 111.81 (3) (Supp. 1973).

191*Id.* § 111.81.

192Wisconsin's Municipal Employee Relations Act governs the labor-management relationship on the municipal level only. *Id.* § 111.70. The provision regulating labor relations for state employees is the State Employment Labor Act, an entirely separate provision from that pertaining to city employees. *Id.* § 111.80-.94.

193Clark, *supra* note 103, at 120.

194Klaus, *supra* note 14, at 2.

1953 C.F.R. 521 (1959-63 comp.), 5 U.S.C. § 631 (1964).

1963 C.F.R. 861 (1973).

ployees, supervisors, and employees outside the United States.[197] Administration of the order is vested in a Federal Labor Relations Council, and a Federal Service Impasses Panel is set up to recommend channels of impasse resolution when the parties fail to resolve disputes themselves.[198] The Assistant Secretary of Labor is given the power to act as judge in unit disputes, election contests, unfair labor proceedings, and the determination of eligibility of unions for national consultation rights.[199] Procedures are set up for recognition and formal recognition, and a code of unfair labor practices is prescribed.[200] Generally, the order has functioned well, and it has been applauded generally by students of government-sector labor law.[201] A major criticism of the order has been that case handling is too slow, although if recent recommendations for improvement of the order are adopted, this criticism will be ended.[202]

The breadth and variety of these sample comprehensive programs suggest the flexibility of the comprehensive approach. Comprehensive programs can be tailored to meet the needs of any level of government, whether federal, state, county, or municipal. Thus, the comprehensive approach should hold a special attraction for legislators faced with the task of molding new public-service labor laws, since it can be shaped and formed through compromise without losing its basic thrust. In addition, the comprehensive approach will benefit public employers by prohibiting strikes which often result in demands for amnesty and surrender to the unions' exorbitant demands.[203] Better pay, increased status, and a more audible voice in the terms of their employment should also attract more capable public employees. The unions would benefit since they would be able to represent their membership adequately within the structure of the comprehensive program without incurring the expense or risking the loss of power that a strike, successful or not, entails.[204] Most importantly, the public would benefit from comprehensive policies. If higher caliber

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[197] *See* U.S. DEP'T OF LABOR, FEDERAL LABOR LAWS AND PROGRAMS 67 (1971).

[198] *Id.* at 68.

[199] *Id.* at 69.

[200] Wray, *supra* note 35, at 91.

[201] *Id.* at 106.

[202] ABA eq. SECTION OF LABOR RELATIONS LAW, *supra* note 47, at 169. *See also* Matthews, *Federal Labor Relations: A Program in Transition,* 21 CATH. U.L. REV. 512, 552-67 (1972).

[203] Lev, *supra* note 144, at 776.

[204] George Meany, a staunch defender of the right to strike, made it clear that unions would prefer to pursue other means of dispute settlement than the strike when he said, "Strikes are expensive. We'd like to see some mechanism that would eliminate strikes because we find that strikes are becoming more and more expensive not only to industry, but to those we represent." *Quoted in* Kagel & Kagel, *supra* note 104.

employees are drawn to the public sector by higher pay and better status, the quality of services should improve, and the public would profit. This process will result in an increased tax burden, but the public will have to determine which, in the long run, will be more expensive: the cost of better services and concomitant decrease in the number of government-employee strikes; or the political, social and economic expense of continued public-employee strikes.

Whatever course the public chooses, it becomes more obvious as the public-strike problem worsens each year that the choice between further strikes and more workable procedures will have to be made. Strike prohibitions alone simply have not worked.[205] While dispute-settlement procedures have shown some promise in decreasing the strike problem, such procedures have performed disappointingly where enacted in a vacuum, without supportive measures.[206] It seems, then, that a probable solution lies in the adoption of an integrated, unified program for dealing with labor relations in the public sector. The comprehensive approach offers the opportunity for this kind of program. The comprehensive plan provides for a strike ban, a vital element of any public labor relations law at a time when the public "is probably not ready" for legalization of the government-employee strike.[207] The comprehensive plan offers bargaining aids and disputes-settlement techniques to provide alternatives to the strike. An most importantly, the comprehensive approach packages all of its features into a centrally administered, unified program, specifically enacted to confront and answer the problem of strikes by government employees.

If the choice is to be made, between further government-sector strikes and more effective procedures for coping with them, it must be made before the public-employee strike problem reaches unmanageable proportion. The comprehensive philosophy offers a sound, reasoned, and plausible approach, and it should receive serious consideration in the search for more satisfactory labor relations in government employment.

Lawrence Primeaux

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[205]*See* Comment, *The Strike and Its Alternatives, supra* note 41, at 553.

[206]Comment, *Collective Bargaining for Public Employees, supra* note 38, at 270-71.

[207]Anderson, *supra* note 157, at 969.

APPENDIX

TABLE A

GOVERNMENT EMPLOYMENT-UNION MEMBERSHIP

Year	Number of Employees	Number of Unions	Union Membership	Percentage of Union Membership
1956	7,685,000	34	915,000	5.1%
1957	8,047,000	—	—	—
1958	8,297,000	41	1,035,000	5.8
1959	8,487,000	—	—	—
1960	8,808,000	41	1,070,000	5.9
1961	9,100,000	—	—	—
1962	9,388,000	41	1,225,000	7.0
1963	9,736,000	—	—	—
1964	10,064,000	59	1,453,000	8.1
1965	10,589,000	—	—	—
1966	11,388,000	—	—	—
1967	11,867,000	—	—	—
1968	12,342,000	59	2,155,000	10.7
1969	12,691,000	—	—	—
1970	—	60	2,318,000	11.2

Source: U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS 1971 at 93, 303-305; HANDBOOK OF LABOR STATISTICS 1972 at 332.

TABLE B

PUBLIC-EMPLOYEE WORK STOPPAGES

Year	Number	Workers Involved	Man-Days Idle
1956	27	3,460	11,100
1957	12	820	4,430
1958	15	1,720	7,510
1959	25	2,050	10,500
1960	36	28,600	58,400
1961	28	6,610	15,300
1962	28	31,100	79,100
1963	29	4,480	15,400
1964	41	22,700	70,800
1965	42	11,900	146,000
1966	142	105,000	455,000
1967	181	132,000	1,250,000
1968	254	202,000	2,550,000
1969	411	160,000	745,700
1970	412	333,500	2,023,300

Source: U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS 1971 at 318-321; HANDBOOK OF LABOR STATISTICS 1972 at 348.

NOTE: No figures are available prior to 1956, and these are the latest figures available. Figures pertain to employees at local, state and federal levels.

RECENT DECISIONS

EVIDENCE — VOLUNTARY POLYGRAPH EXAMINATION RESULTS ADMISSIBLE AS EXPERT TESTIMONY

Editor's Note — The instant decision, which was well reasoned and logically presented by the District Court for the District of Columbia, was summarily reversed without opinion (475 F.2d 1280, D.C. Cir. 1972). It is our belief that an opinion was warranted at the appellate level.

Defendant, charged with assault with intent to kill while armed, submitted in a pre-trial evidentiary hearing that the results of a polygraph examination, administered by an expert[1] and voluntarily taken, should be admissible as expert testimony.[2] The defense contended that the expert testimony concerning the reliability of polygraph testing was sufficient to establish a foundation for the admission at trial of the polygraph examiner's interpretation of the test. The government presented expert testimony in an attempt to show that the polygraph is not absolutely accurate[3] and that even if polygraph tests are generally reliable, flaws[4] in the instant test destroyed its credibility. The District Court for the District of Columbia, *held,* for defendant. Results of a voluntary polygraph examination, administered by an expert, are admissible as expert testimony concerning the truthfulness of the defendant's answers to factual questions about the crime. *United States v. Zeiger,* 350 F. Supp. 685 (D.D.C.); *rev'd per curiam,* 475 F.2d 1280 (D.C. Cir. 1972).

The French and the Chinese were the first to use "lie detection" tests based upon physiological observations.[5] The first modern method

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[1]Lt. Shoop of the Metropolitan Police Department, a polygraph expert whose expertise was not questioned by the Government, administered the test to the defendant 12 days after the alleged crime.

[2]Generally, evidence is admitted if it would tend to prove any material fact. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES 401-02 (Rev. Draft 1971).

Expert testimony is testimony by someone qualified as an expert by his knowledge, skill, experience or training about his field of knowledge which will help clarify some point of evidence or determine a fact. *Id.* at 702. *See also* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 184 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK ON EVIDENCE].

[3]Dr. Martin Orne, a polygraph authority, testified for the Government that the polygraph's accuracy is 85 percent or better. This estimate appears to have been an attempt to show the absence of absolute scientific accuracy of the test.

[4]The Government argued that irregularities in the pretest interview, the control questions, the length of the questions, and the number of tests, made the usefulness of the defendant's examination questionable.

[5]Langley, *The Polygraph Lie Detector: Its Physiological Basis, Reliability and Admissibility,* 16 ALA. LAW. 209 (1955). For an excellent history of the development of modern "lie detection" methods *see* J. REID & F. INBAU, TRUTH AND DECEPTION: THE POLYGRAPH ("LIE-DETECTOR") TECHNIQUE 1-3 (1966).

of recording physiological parameters to determine whether the subject is telling the truth was the polygraph. Noticeable changes in the established parameters during questioning enable the expert examiner to conclude that the subject is lying.[6] The first attempt to admit expert testimony regarding the results of a "lie detection" test[7] was made in *Frye v. United States*.[8] The *Frye* court, in rejecting the defense counsel's proffer of expert testimony, established the rule for admissibility of scientific evidence[9] to be the general acceptance of the principle in the particular field in which it belongs.[10] This standard was applied in most subsequent cases,[11] but two later decisions, while concurring in the reasoning of the *Frye* decision, impliedly added infallibility as an additional qualification for admission of polygraph examinations.[12] Other cases simply took judicial notice that the test results were inadmissible.[13] The belief that there was a general lack of scientific acceptance of the accuracy and reliability of the machine, coupled with the fear that the jury would place undue credence in the infallibility of the machine were reasons for exclusions of polygraph evidence in several cases.[14] Legal writers also asserted that the absence of standard licensing requirements for polygraph examiners was another valid reason for the continued exclusion of the examiner's testimony.[15] The polygraph was also attacked on fifth amendment self-incrimination grounds,[16] especially where

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[6]*See* Langley, *supra* note 5, at 210-12.

[7]The test used was a systolic blood pressure test, which theoretically discovered the subject's deception by means of periodic discontinuous blood pressure readings.

[8]293 F. 1013 (D.C. Cir. 1923).

[9]McCormick on Evidence § 203, at 489.

[10]Writers have asserted that "general scientific acceptance" would be the appropriate standard for taking judicial notice of a fact, but it is not the proper test for the admissibility of scientific evidence. McCormick on Evidence § 203, at 491; Kaplan, *The Lie Detector: An Analysis of Its Place in the Law of Evidence,* 10 Wayne L. Rev. 381, 386 (1964).

"The traditional test for relevance is to consider the probative value of the evidence and to weight this against its counterfactors. . . ." Radek, *The Admissibility of Polygraph Results in Criminal Trials: A Case for the Status Quo,* 3 Loy. U.L.J. 289, 300-01 (1972).

[11]Marks v. United States, 260 F.2d 377 (10th Cir. 1958), *cert. denied,* 358 U.S. 929 (1959); Hawkins v. State, 222 Miss. 753, 77 So. 2d 263 (1955); Commonwealth *ex rel.* Riccio v. Dilworth, 179 Pa. Super. 64, 115 A.2d 865 (1955).

[12]Kaplan, *supra* note 10, at 383-85, *citing* People v. Forte, 279 N.Y. 204, 18 N.E.2d 31 (1938), *and* State v. Bohner, 210 Wis. 651, 246 N.W. 314 (1933). *Accord,* McCormick, *Deception-Tests and the Law of Evidence,* 15 Calif. L. Rev. 484, 500 (1927).

[13]McCormick on Evidence § 207, at 506.

[14]People v. Davis, 343 Mich. 348, 72 N.W.2d 269 (1955); People v. Leone, 25 N.Y.2d 511, 255 N.E.2d 696, 307 N.Y.S.2d 430 (1969).

[15]Radek, *supra* note 10, at 294-95; Wicker, *The Polygraphic Truth Test and the Law of Evidence,* 22 Tenn. L. Rev. 711, 726-27 (1953).

[16]Radek, *supra* note 10, at 299-300.

submission to the test was required.[17] This argument was rejected, in *United States v. Ridling*.[18] Another court asserted that the inability to cross-examine the machine excluded polygraph examination results[19] but this contention was countered by a prominent polygraph expert who pointed out that the same was true of x-rays and other forms of medical testimony.[20] Even though several other less reliable forms of scientific evidence were admitted under the *Frye* test,[21] for years the only cases in which courts allowed expert testimony concerning the results of polygraph testing were those in which the parties agreed through written stipulation to allow such testimony.[22] In the majority of cases, however, the courts have not only held the results of polygraph examinations inadmissible but have held it inadmissible merely to mention that a test was taken[23] or that one of the parties would[24] or would not[25] submit to a polygraph examination.[26] As the reliability of polygraph testing increased,[27] certain trial courts, congressional committees, police departments, private investigative agencies, and private industries began to utilize the polygraph;[28] and several states adopted licensing and regulatory acts for polygraph examiners.[29] The courts,

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[17]Koffler, *The Lie Detector—A Critical Appraisal of the Technique as a Potential Undermining Factor in the Judicial Process*, 3 N.Y.L.F. 123, 153 (1957).

[18]350 F. Supp. 90 (E.D. Mich. 1972). The court held that since "[a] test cannot be made without the full cooperation of the defendant. . . . if adequate warnings are given as to the possible use of the tests, the taking of the test itself is a waiver of the privilege." *Id.* at 97.

[19]Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949).

[20]REID & INBAU, *supra* note 5, at 240.

[21]*E.g.*, State v. Olivas, 77 Ariz. 118, 267 P.2d 893 (1954) ("breath test" for intoxication); Coppolino v. State, 223 So. 2d 68 (Dist. Ct. App. Fla.), *appeal dismissed*, 234 So. 2d 120 (Fla. 1969), *cert. denied*, 399 U.S. 927 (1970) (chemical detection in corpse). *Contra*, People v. King, 266 Cal. App. 2d 437, 72 Cal. Rptr. 478 (Ct. App. 1968) ("voiceprint" identification inadmissible). *But see* United States v. Wright, 17 U.S.C.M.A. 183, 37 C.M.R. 447 (1967) ("voice print" identification allowed).

[22]State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962); Herman v. Eagle Star Ins. Co., 283 F. Supp. 33 (C.D. Cal. 1966), *aff'd*, 396 F.2d 427 (9th Cir. 1968) (civil case); People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (Dist. Ct. App. 1948). *Contra*, State v. Trimble, 68 N.M. 406, 362 P.2d 788 (1961).

[23]Mattox v. State, 240 Miss. 544, 128 So. 2d 368 (1961); State v. Smith, 113 Ohio App. 461, 178 N.E.2d 605 (Ct. App. 1960).

[24]State v. Anderson, 261 Minn. 431, 113 N.W.2d 4 (1962).

[25]State v. Kolander, 236 Minn. 209, 52 N.W.2d 458 (1952); State v. Britt, 111 S.E.2d 669 (S.C. 1959).

[26]MCCORMICK ON EVIDENCE § 207, at 506.

[27]One noted authority on the polygraph reported that of the over thirty-five thousand examinations he and his associates had conducted the percentage of known errors was less than 1 percent. REID & INBAU, *supra* note 5, at 234.

[28]Koffler, *supra* note 17, at 124.

[29]ILL. ANN. STAT. ch. 38, §§ 202-1 to -30 (1964); KY. REV. STAT. §§ 329.010-.990 (1969); MISS. CODE ANN. §§ 8920-61 to -86 (Supp. 1972); N.M. STAT. ANN. §§ 67-31-1 to -14 (Supp. 1971).

however, generally continued to hold the results of polygraph tests inadmissible,[30] in spite of attempts to show that the polygraph had met the *Frye* standard.[31] In October, 1972, however, following the presentation of foundation testimony, a Michigan federal district court decision[32] allowed the admission of polygraph results at trial, subject to certain conditions.[33] Shortly thereafter, a New York trial court[34] followed the Michigan decision by ordering polygraph testing of both parties in a civil suit where the parties' testimony was diametrically opposed. In *Romero v. State,*[35] however, the Texas Court of Criminal Appeals, after reviewing the history of polygraph evidence from *Frye* to *Ridling,* decided not to admit polygraph evidence even though there had been a pre-trial stipulation to admit the test results.

In the instant case the court concluded from expert testimony that polygraph testing met the *Frye* standard of "general acceptance." Noting the expertise of the examiner, the court held that possible defects in the testing should not bar the testimony, but should be considered by the jury in determining the proper weight to be given the examiner's testimony. The court further held that the final determination of the admissibility of the evidence and the responsibility to properly instruct the jury as to the evaluation of expert testimony rests with the trial judge. The court limited its decision to cases in which admission of polygraph evidence is sought by the defendant who has voluntarily taken the test. Also, the court restricted the testimony of the examiner to the truthfulness of the defendant's answers to factual questions, thus not allowing an opinion by the examiner as to the defendant's guilt or innocence.

The instant decision is the second recent case to find, after the presentation of foundation testimony, that the results of a polygraph examination meet the *Frye* standard of "general acceptance."[36] Had *Zeiger* not been reversed on appeal, those jurisdictions which have adopted the *Frye* standard could have taken judicial notice that polygraph examinations have met the "general acceptance" standard since the instant decision is in the same district as the *Frye* decision.[37]

The reversal of this case (especially since the reversal was not explained) should not prevent other enlightened courts from admitting polygraph evidence, following the presentation of adequate foundation

[30]Zupp v. State, 283 N.E.2d 540 (Ind. 1972).

[31]People v. Davis, 343 Mich. 348, 72 N.W.2d 269 (1955); People v. Leone, 25 N.Y.2d 511, 255 N.E.2d 696, 307 N.Y.S.2d 430 (1969).

[32]United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972).

[33]*Id.* at 99. The conditions were: (a) The court would appoint the necessary polygraph examiner(s), (b) the defendant voluntarily participated, and (c) indeterminate test results would not be admitted.

[34]Walther v. O'Connell, 72 Misc. 2d 316, 339 N.Y.S.2d 386 (N.Y. City Civ. Ct. 1972).

[35]493 S.W.2d 206 (Tex. Crim. App. 1973) (case of first impression); *accord,* United States v. Urquidez, 13 CRIM. L. REP. 2135 (C.D. Cal. 1973).

[36]The first case was *Ridling,* in which polygraph examination results were allowed in a perjury case.

[37]The District of Columbia.

testimony similar to that in *Zeiger*. Although both applicable Mississippi decisions have held polygraph examination results inadmissible,[38] there was no attempt in either case to present foundation testimony showing the reliability and acceptance of the polygraph. Therefore, the testimony and analysis employed by the district court in *Zeiger,* and the Polygraph Examiners Act,[39] should provide strong arguments for the admission of polygraph evidence in the next appropriate Mississippi case. The courts, however, in allowing testimony concerning the results of polygraph examinations should follow the instant decision in imposing certain limitations to insure the validity and constitutionality of the evidence. Proof should be required of the examiner's expertise if the state does not have strict licensing requirements. Also, to avoid the "battle of the experts" prevalent in most cases involving experts, the examiner should be appointed by the court. In each case, before the test results are admitted, the examiner should be required to show that the machine was in proper working condition at the time of the tests. The fifth amendment safeguards require that only the results of an examination voluntarily submitted to by the defendant should be admissible. In each case the trial judge should have the authority to exclude the evidence if he feels the probative value of the testimony is outweighed by the danger of overemphasis by the jury. The judge should also adequately instruct the jury concerning expert evidence to insure proper evaluation of the evidence. To avoid prejudicing the jury and usurping their function as fact-finders, testimony by the examiner should be limited to his assessment of the truthfulness of the defendant's answers to factual questions concerning the crime and an explanation of the basis for his opinion. In no case should the examiner be allowed to speculate about the guilt or innocence of the defendant. If these limitations are recognized the polygraph could become a useful jurisprudential tool. It could be especially helpful, for instance, in cases where the testimony of key witnesses is contradictory, or where there is only one witness. Should voluntary submission to a polygraph examination become a common practice, the recognized validity of the test should lead to dismissal of some cases and the entry of guilty pleas in others, thereby not only benefiting society, but also helping to unclog the congested court calendar.[40]

William J. Landers

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[38]Mattox v. State, 240 Miss. 544, 128 So. 2d 368 (1961) (reversed trial verdict for admission of testimony that witness had taken polygraph test); Hawkins v. State, 222 Miss. 753, 77 So. 2d 263 (1955) (upheld trial judge's refusal to admit polygraph test results).

[39]MISS. CODE ANN. §§ 8920-61 to -86 (Supp. 1972). The act provides for the establishment of a Polygraph Examiners Board which licenses, regulates, and disciplines polygraph examiners. Uniform minimum requirements are also established for licensing examiners. Although section 8920-85 states that it should not be construed as permitting the results of polygraph examinations to be admitted as evidence, the act does not specifically prohibit their use. In fact, the adoption of the Act eliminates the argument that the lack of standardization for licensing and regulating examiners should prevent the admission of polygraph evidence.

[40]United States v. Ridling, 350 F. Supp. 90, 98 (E.D. Mich. 1972).

TORTS — ATTRACTIVE NUISANCE DOCTRINE — SMUDGE POTS ARE NOT SO INHERENTLY DANGEROUS AS TO REQUIRE APPLICATION OF ATTRACTIVE NUISANCE DOCTRINE

Appellant, a 5-year-old boy, sued the city of Biloxi for personal injuries sustained when he kicked over a flaming smudge pot. His leg became drenched with kerosene from the pot, which ignited causing severe burns.[1] Appellant, who testified that he was aware of the danger of open flames, contended that the city was liable under the attractive nuisance doctrine by permitting the smudge pot to be placed in an area where it attracted young children[2] and requested that the jury be instructed to apply the doctrine in determining the duty owed by the city to children of tender years.[3] The city denied any negligence and moved for a directed verdict, which was denied. The circuit court refused to instruct the jury to apply the attractive nuisance doctrine and rendered judgment on the jury's verdict for the city. On appeal to the Mississippi Supreme Court, *held,* affirmed. A flaming smudge pot placed in a residential neighborhood as a warning device is not so inherently dangerous as to require application of the attractive nuisance doctrine. *Jackson v. City of Biloxi,* 272 So. 2d 654 (Miss. 1973).

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[1]Appellant, who brought suit through his mother as next friend, also named as a party to the suit Toledo Pressed Steel Company, the manufacturer of the smudge pot. Appellant alleged that Toledo should have been held liable under the theory of strict liability in tort for placing the pot on the market in a defective condition. The circuit court directed a verdict for Toledo. On appeal, the supreme court held that the doctrine of strict liability in tort, as stated in State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), *cert. denied,* Yates v. Hodges, 386 U.S. 912 (1967), does not apply because of the lack of substantial evidence showing that the smudge pot was unsafe. For a comprehensive study of the field of products liability in Mississippi, see Maraist & Barksdale, *Mississippi Products Liability — A Critical Analysis,* 43 MISS. L.J. 139 (1972).

[2]For Mississippi's application of the attractive nuisance doctrine, *see* text accompanying notes 25-34 *infra.*

[3]Appellant's Instruction No. 10, which the court refused, reads as follows:

> The court instructs the Jury for the Plaintiff that under the law of the State of Mississippi, one who maintains a condition [or], instrumentality . . . which is dangerous to children of tender years by reason of their inability to appreciate the perils thereof, and which may . . . attract young children, is under a duty to exercise reasonable care to protect them against the dangers of the attraction, and that, if you believe from a preponderance of the evidence . . . that the smudge pot . . . was maintained by the City of Biloxi and was dangerous to children of tender years by reason of their inability to appreciate the perils thereof, and was an instrumentality which . . . attract[ed] young children, that the City of Biloxi . . . negligently failed to exercise reasonable care to protect young children . . . against the dangers of this attraction and that such failure, if any, to exercise reasonable care to protect young children was the proximate . . . cause of the Plaintiff's damages, then it is your sworn duty to return a verdict in favor of the Plaintiff and against the Defendant. . . .

Appellant also claimed the city was negligent for leaving the burning pot in a residential area during daylight hours. Neither the circuit court nor the supreme court agreed.

Originally, owners and occupiers of land in the United States owed no duty of care to uninvited children entering upon the land except to refrain from wilful or wanton misconduct. Consequently, in the absence of such conduct, child trespassers and licensees at common law were treated as adults and barred from recovery when injured on or by the property of others.[4] In 1873 a "special rule" affecting the landowner's liability to trespassing children was introduced by the United States Supreme Court in *Sioux City & Pacific Railroad v. Stout*.[5] In *Stout* the railroad was held liable for injuries sustained by a small boy whose foot was crushed while he was playing on an unguarded railroad turntable. The Court made little comment except to distinguish between adult and child trespassers.[6] Two years later, in another turntable case, a Minnesota court, held that an injured child had been "invited" to the premises by virtue of the alluring nature of the turntable.[7] It was from the feature of allurement that the label "attractive nuisance" evolved.[8] Initially, the

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[4]For discussions of the trespasser, licensee, and invitee classifications *see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 57-62 (4th ed. 1971); Comment, *Trespassers, Licensees, and Invitees: Are the Distinctions Needed?*, 41 MISS. L.J. 562 (1970).

[5]84 U.S. (17 Wall.) 657 (1873). The *Stout* case was foreshadowed in England by the 1841 case of Lynch v. Nurdin, 113 Eng. Rep. 1041 (Q.B. 1841), where the defendant was held liable for injuries sustained by a child who was playing on a negligently loaded cart which was parked on the street. W. PROSSER, *supra* note 4, § 59 at 364. It is notable that liability was found in *Lynch* even though the chattel was in the public street, rather than on the land of another.

The designation "special rule" is used by Prosser when he speaks of the attractive nuisance doctrine in general terms encompassing the several versions of the doctrine. The designation will be used for the same purpose in the text of this note (without quotation marks). *See id.*

[6]The Court concluded that ". . . the conduct of an infant is not to be judged by the same rule which governs that of an adult." 84 U.S. (17 Wall.) at 660. Prosser explains that the reason for distinguishing children from adults ". . . is the inability of the child to protect himself against the perils which he encounters. If that reason does not exist . . . the whole policy of the special rule fails with it." Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427, 461 (1959).

[7]Keffe v. Milwaukee & St. P. Ry., 21 Minn. 207 (1875). The court stated:

> the turn-table . . . presented . . . a strong temptation. . . . [The] children . . . were thus allured into a danger whose nature and extent they . . . could neither apprehend nor appreciate. . . . The difference between the plaintiff's position and that of a voluntary trespasser . . . [is that] the plaintiff was induced to come upon the defendant's turn-table by the defendant's own conduct . . . [so] the turntable was a hidden danger, a trap.

Id. at 21. By his being invited, the plaintiff's status was changed to that of an invitee, to whom the defendant owed a duty to reveal hidden dangers. *See* W. PROSSER, *supra* note 4, § 61 at 385. The theory expounded in *Keffe* has been called the "implied invitation" theory since the landowner by implication invited the child on to the premises by virtue of the alluring qualities of the turntable. Green, *Landowner's Responsibility to Children*, 27 TEXAS L. REV. 1, 7 (1948).

[8]W. PROSSER, *supra* note 4, § 59 at 364-65. The doctrine has also been given other names including the following: "attractive agencies," Schock v. Ringling Bros. & Barnum & Bailey Combined Shows, 4 Wash. 2d 599, 105 P.2d 838 (1940); "attractive

special rule was criticized by courts in several jurisdictions but is now accepted in some form in all but five states.[9] Jurisdictions applying the special rule are generally split into three separate but related schools of thought. One version has developed from the rule as originally promulgated in the "turntable cases."[10] Courts following this rule generally limit rather than expand liability, applying the rule only where the instrumentality is unusual, inherently dangerous, and alluring to children.[11] In 1934 a second version of the special rule was formulated in the *Restatement of Torts*.[12] Courts adhering to the 1934 *Restatement*

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instrumentalities," Davis v. Malvern Light & Power Co., 186 Iowa 884, 173 N.W. 262 (1919).

[9]Prosser, *Trespassing Children, supra* note 6, at 432. One of the strongest denunciations appears in Ryan v. Towar, 128 Mich. 463, 87 N.W. 644 (1901). Green commented that the doctrine was the most controversial common-law doctrine of the era, and found it remarkable that the doctrine survived the vigorous attacks it received from the judiciary. Green, *Landowner's Responsibility to Children, supra* note 7, at 1.

Those states not recognizing the special rule are: *Maryland,* Bramble v. Thompson, 264 Md. 518, 287 A.2d 265 (1972); *Massachusetts,* Urban v. Central Mass. Elec. Co., 301 Mass. 519, 17 N.E.2d 718 (1938); *New Hampshire,* Devost v. Twin State Gas & Elec. Co., 79 N.H. 411, 109 A. 839 (1920); *Ohio,* Ware v. City of Cincinnati, 93 Ohio App. 431, 111 N.E.2d 401 (1952); *Vermont,* Bottum's Adm'r v. Hawks, 84 Vt. 370, 79 A. 858 (1911).

[10]*E.g.,* Keffe v. Milwaukee & St. P. Ry., 21 Minn. 207 (1875).

[11]*See, e.g.,* Ryckeley v. Georgia Power Co., 122 Ga. App. 107, 176 S.E.2d 493 (1970); Lucas v. Hammond, 150 Miss. 369, 116 So. 536 (1928). The limited scope of this note precludes examination of all versions of the attractive nuisance doctrine that developed after 1873. One writer, however, has listed the following elements that are generally common to all versions:

> (i) the condition creating the harm had to be an artificial one, created, constructed or maintained by the possessor of land; (ii) the injured person had to be a child of 'tender years'; (iii) the child . . . was excused or excluded from the disabilities imposed by law on adult trespassers; (iv) the risk which caused the harm to the child was one which was not obvious or apparent to the child; and (v) reasonable precautions were available to minimize or eliminate the risk without impairing the utility of the condition and the possessor had failed to take such precautions.

Gorfinkel, *Residential Swimming Pools and "Attractive Nuisance" in California,* 13 Hastings L.J. 38, 39 (1961).

[12]Restatement of Torts § 339 (1934), which reads as follows:

> A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if (a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and (b) the condition is one of which the possessor knows or should know, and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein.

rule or its 1965 revision in the *Restatement (Second) of Torts,*[13] generally emphasize the need to weigh the reasonableness of the condition, the age and understanding of the child, and the cost and burden of eliminating the risk.[14] It was the adoption of the *Restatement* rule that caused some courts to replace the dangerous and unusual instrumentality requirement with a third version of the special rule, a more flexible negligence oriented approach which considers all the circumstances having a bearing on the reasonable forseeability of harm to children. As in the *Restatement,* the negligence oriented jurisdictions have eliminated the allurement requirement and consider it merely as evidentiary, relevant to the question of negligence.[15]

Comparison of the original doctrine and the *Restatement* rule reveals that under both the determination of whether the injured child comprehended the danger is of critical importance. Under the *Restatement* rule, if the child can reasonably be expected to fully appreciate the danger recovery is barred.[16] Likewise, under the traditional attractive nuisance doctrine, if the child discovers and appreciates the risk and is able to avoid it then he stands in no better position than an adult under similar conditions.[17] In determining a child's appreciation, it has been

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Prosser described the *Restatement* rule as ". . . perhaps its most effective single section." Prosser, *Trespassing Children, supra* note 6, at 435. It is significant that the writers of the *Restatement* discarded the term "attractive nuisance" and headed the section: "Artificial Conditions Highly Dangerous to Trespassing Children."

[13]The significant changes in the second version were the deletion of the word "young" as a prefix for "children," and the addition of clause (e) which requires that the possessor exercise "reasonable care to eliminate the danger." RESTATEMENT (SECOND) OF TORTS § 339 (1965). For a comparison of the two sections *see* Note, *Trespassing Children: A Study in Expanding Liability,* 20 VAND. L. REV. 139, 147-48 (1966).

[14]*See* Note, *Trespassing Children: A Study in Expanding Liability, supra* note 13, at 146-50.

[15]*See* Fulford, *The Tort Liability of the Possessors of Property to Trespassing Children in Alabama,* 11 ALA. L. REV. 1, 25 (1958). Fulford presents a general statement of the special rule as viewed from the negligence standpoint which reads as follows:

> If a landowner creates or maintains upon his premises, where he can reasonably forsee the presence of children, a dangerous situation under circumstances which he should reasonably anticipate will likely or probably cause bodily harm to them, he is liable in damages to one proximately injured by such situation whether the child is an invitee, licensee or trespasser.

Id. at 14. For a clear distinction between the negligence approach and other versions *see* Note, *Trespassing Children: Oregon Adopts a New View,* 1 WILLAMETTE L.J. 379 (1960).

[16]*See* Prosser, *Trespassing Children, supra* note 6, at 461-62.

[17]*Id.* at 461. It is appreciation of the danger and not mere knowledge of the dangerous condition that bars recovery. *Id.* at 462. Prosser provides an example of the distinction by citing an Arizona decision, Buckeye Irrigation Co. v. Asken, 45 Ariz. 566, 46 P.2d 1068 (1935), where the court distinguished between a child's knowledge that blasting powder would explode or burn and the child's appreciation

held in some states that recovery extends only to dangers of a latent or hidden character and not to patent or obvious dangers such as the common hazards of fire, height, and water; however, under special circumstances recovery has been granted.[18]

From its origin, the special rule has been applied primarily in instances where children are injured while trespassing upon the defendant's land. The rule, however, is also applicable where children trespass upon chattels maintained by individuals or municipal corporations[19] located on either public or private lands. Some courts, noting the propensity of children to play in the streets, apply the special rule exclusively to dangers found in the public domain.[20] The language of the *Restatement* is not expressly applicable to children trespassing on instrumentalities in the public domain,[21] but most jurisdictions that have adopted the *Restatement* view apply it regardless of whether the injury occurs on private or public property.[22]

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that the powder might flare up and ignite other powder contained in his pockets. Prosser, *Trespassing Children, supra* note 6, at 462.

[18]Note, *Trespassing Children: A Study in Expanding Liability, supra* note 13, at 151-53. Many states have recognized the "common hazards" exception by holding as a matter of law that under the obvious hazards of fire, height, and water, a child will be denied recovery. *Id.* at 151; *see, e.g.,* Cox v. Alabama Water Co., 216 Ala. 35, 112 So. 352 (1927) (water); Lentz v. Schuerman Bldg. & Realty Co., 359 Mo. 103, 220 S.W.2d 58 (1949) (fire); Mikkelson v. Risoui, 141 N.W.2d 150 (N.D. 1966) (height). Under special circumstances, however, the child has been allowed to recover; *see, e.g.,* Idzi v. Hobbs, 186 So. 2d 20 (Fla. 1966) (5-year old not capable of realizing risk of trash fire); Skaggs v. Junis, 27 Ill. App. 2d 251, 169 N.E.2d 684 (1960) (child injured after striking head against submerged stump in pond); Salanski v. Enright, 452 S.W.2d 143 (Mo. 1970) (boy fell from treehouse but court held he could not appreciate danger because of his anxiety to reach the treehouse).

[19]Municipal corporations have been defendants in numerous attractive nuisance suits. Governmental immunity has usually not been an issue since the municipality is said to owe a duty of care toward children using the streets for recreation. Gilligan v. City of Butte, 118 Mont. 350, 166 P.2d 797, 801 (1946); *accord,* Schmit v. Village of Cold Spring, 216 Minn. 465, 13 N.W.2d 382, 384 (1944). *Contra,* Smith v. City of Jefferson, 8 Wis. 2d 378, 99 N.W.2d 119 (1959).

[20]*See* Prosser, *Trespassing Children, supra* note 6, at 436; Comment, *Children Trespassing on Chattels in the Public Domain,* 25 WASH. & LEE L. REV. 90, 92-94. The special rule is purportedly applicable only to instrumentalities located in the public domain in the states of New York and West Virginia. *See, e.g.,* Long v. City of Dunkirk, 260 N.Y. 599, 184 N.E. 109 (1932); Rine v. Morris, 99 W.Va. 52, 127 S.E. 908 (1925).

[21]*See* RESTATEMENT (SECOND) OF TORTS § 339 (1965). The first line reads: "A possessor of land is subject to liability for physical harm to children *trespassing* thereon. . . ." *Id.* (emphasis added).

[22]Comment, *Children Trespassing on Chattels in the Public Domain, supra* note 20, at 95-96. Prosser suggested in 1959 that the language of the *Restatement* was too narrow and should be altered to include possessors of chattels in addition to possessors of land. Prosser, *Trespassing Children, supra* note 6, at 436, 469.

It has been held that whether the special rule should be applied is a question of law for the court to decide.[23] But most courts, irrespective of which view is followed, hold that the question is one of fact for the jury to determine. In so doing, the jury considers each element of the appropriate rule separately, requiring that all elements be satisfied before the rule is invoked.[24]

Mississippi first applied the special rule to children attracted to dangerous instrumentalities in 1887.[25] Two years later, the supreme court rendered a pair of notable decisions. In one, the court applied a special rule to children who were injured while intermeddling with private property located in public streets and charged all persons with the knowledge that children are by nature curious and tend to play around unusual objects.[26] In the second case, the court committed itself to holding municipal corporations liable for maintaining extraordinarily dangerous agencies in the public domain.[27] It was 1913 before the court took notice that the state was committed to the attractive nuisance doctrine as established in the "turntable cases."[28] In 1928 the Mississippi Supreme Court set forth a comprehensive rule that was held to be the attractive nuisance doctrine in the state.[29] A case by case analysis reveals, however, that the court has not strictly adhered to this rule but instead has applied various conditions and requirements to meet

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[23]*See, e.g.,* Bloodworth v. Stuart, 221 Tenn. 567, 428 S.W.2d 786 (1968); Massie v. Copeland, 149 Tex. 319, 233 S.W.2d 449 (1950).

[24]*See, e.g.,* MacNeil v. Perkins, 84 Ariz. 74, 324 P.2d 211 (1958); Ridgewood Groves, Inc. v. Dowell, 189 So. 2d 188 (Fla. App. 1966).

[25]Mackey v. City of Vicksburg, 64 Miss. 777, 2 So. 178 (1887).

[26]Spengler v. Williams, 67 Miss. 1, 4, 6 So. 613, 614 (1889).

[27]Mayor of Vicksburg v. McLain, 67 Miss. 4, 6 So. 774 (1889).

[28]Thompson v. Illinois Cent. R.R., 105 Miss. 636, 63 So. 185 (1913). For examples of turntable cases *see* Sioux City & Pac. R.R. v. Stout, 84 U.S. (17 Wall.) 657 (1873); Keffe v. Milwaukee & St. P. Ry., 21 Minn. 207 (1875). The court in *Thompson* reviewed the holdings in Temple v. McComb City Elec. Light & Power Co., 89 Miss. 1, 42 So. 874 (1907); Spengler v. Williams, 67 Miss. 1, 6 So. 613 (1889); Mackey v. City of Vicksburg, 64 Miss. 777, 2 So. 178 (1887). In *Thompson* the court established that water hazards do not fall under the attractive nuisance doctrine. Mississippi has been consistent in refusing recovery for drownings in ponds, pools, vats, etc. *See, e.g.,* McGill v. City of Laurel, 173 So. 2d 892 (Miss. 1965); Vincent v. Barnhill, 203 Miss. 740, 34 So. 2d 363 (1948).

[29]Lucas v. Hammond, 150 Miss. 369, 116 So. 536 (1928). The rule reads as follows:

> One who maintains dangerous instrumentalities or appliances on his premises easily accessible to children and of a character likely to attract them to play, or permits dangerous conditions to remain thereon with the knowledge that children are in the habit of resorting thereto for amusement, and who fails to exercise ordinary care to prevent children from playing therewith or resorting thereto, is liable to a child *non sui juris* who is injured thereby, and who did not know and appreciate the danger incurred by him in playing with the instrumentality or in the vicinity of the dangerous condition, or was too young to be charged with such knowledge.

Id. at 381, 116 So. at 537.

the needs of each particular case.[30] The court has often expressed its intention to limit rather than expand application of the doctrine,[31] and therefore has confined application of the rule to inherently dangerous instrumentalities that are unusual or unnatural.[32] In 1970 the court first considered the appropriateness of the *Restatement* rule but refused to adopt it, noting that the rule did not apply to such obvious dangers as fire, water, or height which are normally understood by children old enough to be allowed at large.[33] Presently, Mississippi is one of seven states still applying the traditional attractive nuisance doctrine which has as its main feature the requirement of allurement.[34]

In the instant case, the court reviewed *McGill v. City of Laurel*[35] and stated that the attractive nuisance doctrine is applicable only if the instrumentality in dispute constitutes a "trap" or "hidden or secret" danger[36] and further that consideration should be given as to whether the child appreciates the danger of the instrumentality. The court

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[30]The following requirements, among others, have been held necessary before the doctrine can be invoked: (1) that the dangerous thing be artifically created, McComb Elec. Light & Power Co. v. Hayman, 124 Miss. 525, 536, 87 So. 11, 12 (1921); (2) that there be a latent danger or one that is hidden to the inexperienced child, Gordon v. C.H.C. Corp., 236 So. 2d 733, 735 (Miss. 1970), McGill v. City of Laurel, 252 Miss. 740, 762, 173 So. 2d 892, 902 (1965); (3) that the child be of such tender age and so inexperienced as not to fully comprehend or appreciate the danger, Salter v. Deweese-Gambill Lumber Co., 137 Miss. 229, 239-40, 102 So. 268, 270 (1924); (4) that the one maintaining the dangerous condition has reason to believe that it will be visited by small children, Lucas v. Hammond, 150 Miss. 369, 381, 116 So. 536, 537 (1928), Hercules Power Co. v. Wolf, 145 Miss. 388, 397, 110 So. 842, 843 (1927); (5) that injury is likely to result to children playing near the instrumentality, Hamblin v. Gano, 76 So. 633 (Miss. 1918); (6) that something inseparably connected with the dangerous thing is the proximate cause of injury, McGill v. City of Laurel, 252 Miss. 740, 755, 173 So. 2d 892, 899 (1965), Thomas v. Magnolia Tree Serv., 247 Miss. 357, 363, 154 So. 2d 282, 284 (1963); (7) that the person maintaining the dangerous thing fails to exercise ordinary care to guard against its perils, *see* Shemper v. Cleveland, 212 Miss. 113, 119, 51 So. 2d 770, 773 (1951), *suggestion of error overruled,* 54 So. 2d 215 (1951).

[31]*E.g.,* McGill v. City of Laurel, 252 Miss. 740, 764, 173 So. 2d 892, 903 (1965); Vincent v. Barnhill, 203 Miss. 740, 749, 34 So. 2d 363, 365 (1948); Bonhomie & H.S. Ry. v. Hinton, 155 Miss. 173, 179, 124 So. 271, 272 (1929).

[32]*See, e.g.,* Hercules Powder Co. v. Wolf, 145 Miss. 388, 110 So. 842 (1927) (child injured by exploding dynamite caps); Hamblin v. Gano, 76 So. 633 (Miss. 1918) (child injured by detonating cap left in trash by defendant). *See also* Coleman v. Associated Pipeline Contractors, Inc., 444 F.2d 737, 740 (5th Cir. 1971).

[33]Gordon v. C.H.C. Corp., 236 So. 2d 733, 735 (Miss. 1970).

[34]W. PROSSER & J. WADE, CASES AND MATERIALS ON TORTS 451 (5th ed. 1971). Prosser lists only five: Colorado, Indiana, Louisiana, Mississippi, and Tennessee. Further research reveals that two others probably fall within the category: Missouri, Holifield v. Wigdor, 361 Mo. 363, 235 S.W.2d 564 (1951); and South Carolina, Byrd v. Mellin, 191 S.E.2d 215 (S.C. 1972).

[35]252 Miss. 740, 168 So. 2d 50 (1965).

[36]Jackson v. City of Biloxi, 272 So. 2d 654 (Miss. 1973).

cited *Vincent v. Barnhill*[37] and stated that since no previous claim had ever been presented to the manufacturer for injury occasioned by a smudge pot, the product should not be considered an attractive nuisance. Also, the court stated that it was unwilling to apply the *Restatement* rule where the danger of the open flame was obvious and where the appellant's own testimony revealed that he comprehended the danger. The supreme court held that the circuit court was correct in refusing appellant's instruction that would have allowed a verdict for the appellant based on the attractive nuisance doctrine.

The instant case is significant for two competing reasons. First, the court has again demonstrated its refusal to expand application of the attractive nuisance doctrine. It is realized that the public cannot act as insurers of children's safety[38] and that property owners should not be unreasonably restricted in the use of their property, but the low standard of care used by the court in the instant case is at least questionable. It appears from the opinion that excessive reliance was placed on appellant's testimony that he realized the danger of open flames. However, it was not the open flame alone which injured the child, but more directly it was the kerosene which was hidden from his sight.[39] In holding that the boy fully comprehended the danger and that the question was not for the jury, the court implied that reasonable minds could not differ on the issue. Precedent indicates that this conclusion is rebuttable for it has been held that the open flames of similar warning devices involve a risk which a child might not comprehend.[40] To further support its holding the court implied that smudge pots are not likely to cause bodily injury since Toledo, the manufacturer, had not been previously presented with a claim for injury from its smudge pots.[41] It is surprising that the court, which adopted the attractive nuisance doctrine from other jurisdictions, relied solely on Toledo's

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[37]203 Miss. 740, 34 So. 2d 363 (1948).

[38]Bottum's Adm'r v. Hawks, 84 Vt. 370, 79 A. 858 (1911).

[39]It is submitted that the court would have found it profitable to review Hamblin v. Gano, 76 So. 633 (Miss. 1918). That case dealt with an injured child's appreciation of dynamite. The court said, "It is argued that the child . . . was one of unusual precociousness, and that he should be charged with knowledge of the dangerous character of the cap, as testified that it looked like a cartridge. . . . The child . . . cannot be expected to know, the highly dangerous character of dynamite. . . . *Id.* at 633.

[40]Knox v. City of Granite Falls, 245 Minn. 11, 72 N.W.2d 67, 71 (1955); *accord,* O'Bier v. Manufacturers' Cas. Co., 70 So. 2d 220 (La. App. 1954); Gilligan v. City of Butte, 118 Mont. 350, 166 P.2d 797 (1946); *cf.* Collins v. City of Chicago, 321 Ill. App. 73, 52 N.E.2d 797 (1943). *Contra,* City of Grand Junction v. Lashmett, 126 Colo. 256, 247 P.2d 909 (1952); Clark v. City of Bremerton, 1 Wash. 2d 689, 97 P.2d 112 (1939).

[41]The relevance of this line of reasoning is difficult to comprehend. Toledo was named a party to the suit on a products liability basis, not on the attractive nuisance doctrine. Toledo's record of litigation reveals only that Toledo has not been manufacturing defective smudge pots. This is not germane to the pertinent question of whether smudge pots are likely to cause harm to children. Furthermore,

record and failed to look elsewhere. Precedent is not lacking.[42] In a case where a 3-year-old child's clothes ignited while he was playing near a smudge pot, the Louisiana Court of Appeals said:

> The common kerosene flares . . . might not ordinarily fall within the attractive nuisance designation. But when one of these kerosene flares is placed in a residential area . . . where small children . . . play and where such objects are not . . . ordinarily observed the entire situation and the conclusion ordinarily flowing therefrom are radically changed. . . .[43]

Similar facts were presented in the instant case, but the Mississippi court, instead of considering them, spoke in terms of absolute classification of particular instruments as falling within or beyond the scope of the attractive nuisance doctrine. A more realistic approach would be to consider the facts of each case without regard to rigid classifications and determine whether there was a danger present not appreciated by the plaintiff.

Secondly, this case is notable in light of the court's consideration of the applicability of the *Restatement* rule. The court did not reject the rule but merely refused to apply it to the facts of the case. It is submitted that elimination of the attractive nuisance doctrine and adoption of the 5-point *Restatement* view would provide the court with an ascertainable standard which gives proper weight to all relevant circumstances, *e.g.*, the social utility of the activity, the relative ease of providing safeguards, and the extent to which harm to the child can be foreseen. Had the court in the present case chosen to apply the elements of the *Restatement* rule, many, if not all, of the underlying issues would have been reached.[44]

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it is highly unlikely that a manufacturer of smudge pots would *ever* be sued under the attractive nuisance doctrine since it is the ultimate consumer who actually positions the devices in locations accessible to children.

[42]In the following cases recovery was allowed under the special rule for injury from flaming warning devices: Collins v. City of Chicago, 321 Ill. App. 73, 52 N.E.2d 473 (1943); Knox v. City of Granite Falls, 245 Minn. 11, 72 N.W.2d 67 (1955); Schmit v. Village of Cold Spring, 216 Minn. 485, 13 N.W.2d 382 (1944); Gilligan v. City of Butte, 118 Mont. 350, 166 P.2d 797 (1946). *Contra,* City of Grand Junction v. Lashmett, 126 Colo. 256, 247 P.2d 909 (1952) (testimony revealed child fully recognized danger); Clark v. City of Bremerton, 1 Wash. 2d 689, 97 P.2d 112 (1939) (danger of unguarded trench outweighed danger of fire to children).

[43]O'Bier v. Manufacturers' Cas. Co., 70 So. 2d 220, 223 (La. App. 1954).

[44]The following are among the interesting questions not considered: (1) Are there other warning devices such as electric lights or battery-powered flashers that could serve the same function as a smudge pot but yet be relatively safe? *See* Thiel v. Bahr Constr. Co., 13 Wis. 2d 196, 108 N.W.2d 573 (1961); (2) What is the purpose of burning the flares during the daylight hours? *See* Gilligan v. City of Butte, 118 Mont. 350, 166 P.2d 797 (1946); and (3) What is the standard of care owed by a municipal government to children playing in the streets? *See* Schmit v. Village of Cold Spring, 216 Minn. 465, 13 N.W.2d 382 (1944).

WILLS—DOCTRINE OF DEPENDENT RELATIVE REVOCATION NOT APPLICABLE WHERE WILL WITH VOID BEQUEST CONTAINS EXPRESS REVOCATION CLAUSE

On June 4, 1971, the joint executors named in the will of Hollis H. Crosby[1] filed a petition in the Chancery Court of Harrison County[2] for probate of the will in solemn form. Petitioners contended that since the testator had died within 90 days of the execution of his last will, Item III of that will was void in that it provided for payment of part of the estate to appellee, a charitable medical foundation.[3] Appellee cross-petitioned, asserting that the gift was valid since less than one-third of the estate was devised to the medical foundation,[4] and also contended that even if the gift were void, the identical bequest in an earlier will should be revived by the doctrine of dependent relative revocation.[5] The chancellor found the gift to be valid, and allowed Item III of the earlier will into probate based on the doctrine of dependent relative revocation. The petitioners appealed. After finding the bequest to the medical foundation in the will to be void because of the testator's death within 90 days of the will's execution,[6] the Mississippi Supreme Court, *held,* re-

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[1]Mr. Crosby created his final will on January 20, 1971, and died 64 days later on March 25, 1971. In the will Mr. Crosby expressly revoked an earlier will of September 11, 1970, which contained an identical bequest to the appellee in Item III.

[2]The chancery court of the testator's domicile has jurisdiction to hear all matters testamentary and administrative, based on MISS. CONST. art. 6, § 159.

[3]The Mortmain Statute in Mississippi is found in MISS. CONST. art. 14, § 270, and provides:

> No person leaving a spouse or child, or descendant of a child, shall, by will, bequeath or devise more than one-third of his estate to any charitable, religious, educational or civil institution, to the exclusion of such spouse or child, or descendants of child, and in all cases the will containing such bequest or devise must be executed at least ninety days before the death of the testator, or such bequest or devise shall be void.

MISS. CODE ANN. § 671 (1956) is virtually identical in its language and identical in effect.

[4]The parties stipulated that although the will provided for payment of one-half of the remaining estate to the appellee, this was in fact less than one-third of the gross estate.

[5]The doctrine of dependent relative revocation provides that revocation by a later will which is invalid is actually no revocation, and often courts hold the earlier bequest to be "revived." The appellees argued that Mr. Crosby did not actually intend to revoke the bequest, and offered as proof the identical bequests in both wills. For an excellent definition of this doctrine *see* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 88, at 452 (2d ed. 1953). Mr. Atkinson views the problem as one of mistake, with the aim being to effectuate the intent of the testator. For other definitions of this doctrine, *see* La Croix v. Senecal, 140 Conn. 311, 99 A.2d 115 (1953); *In re* Macomber's Will, 193 Misc. 391, 80 N.Y.S.2d 776 (Sur. Ct. 1948).

[6]The court, based on an earlier Mississippi decision, Bell v. Mississippi Orphans Home, 192 Miss. 205, 5 So. 2d 214 (1941), and also on a Georgia Supreme Court decision in Reynolds v. Bristow, 37 Ga. 283 (1867), held the devise in the second will void even though less than one-third of the total estate was devised. The

versed. Where an invalid bequest is found in a will containing an express revocation clause, an identical bequest in a prior will is not revived by dependent relative revocation. *Crosby v. Alton Ochsner Medical Foundation,* 276 So. 2d 661 (Miss. 1973).

The doctrine of dependent relative revocation developed as a means to accomplish the intent of testators by providing that the revocation of a will is ineffective where it is conditioned upon a certain situation, and the situation does not exist or the testator is mistaken as to its existence.[7] For instance, the doctrine may be applied where a testator revokes a will thinking that a subsequent will is valid. The assumption is that the testator would not have intended revocation of the first will had he known that the second will was invalid.[8] The doctrine of dependent relative revocation,[9] although generally thought to be a recent development of Anglo-American law, was recognized to a certain extent by the Roman system of jurisprudence.[10] The doctrine developed from the guardianship of the law over improvident revocations of valid wills by testators acting under a mistake of law or fact.[11] Although the doctrinal name was not used at the time, the court in an early English case[12] held that revocation could be achieved by either an express clause revoking the earlier will, or by the inclusion of inconsistent terms in the second will. Based on the Statute of Frauds,[13] however, it was held that if both were absent

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court stated that any bequest to a charitable organization must come within the statutory requirements, regardless of the amount of the bequest.

[7]*See* 1 J. ALEXANDER, COMMENTARIES ON THE LAW OF WILLS § 553 (1917); T. ATKINSON, *supra* note 5; 1 T. JARMAN, A TREATISE ON WILLS 119 (6th ed. 1857); DOBIE, *Dependent Relative Revocation of Wills,* 2 VA. L. REV. 327 (1915).

[8]*See* ALEXANDER, *supra* note 7; Dobie, *supra* note 7. Recently the Florida Supreme Court provided this definitive statement:

> Under the doctrine if a testator revokes or destroys his old will with the present intention of making a new will and the new will is not made, or, if made, fails for any reason, a rebuttable presumption arises that the testator would have preferred the old will to intestacy.

In re Lubbe's Estate, 142 So. 2d 130, 134-35 (Fla. Dist. Ct. App. 1962).

[9]The most important article in this area is Warren, *Dependent Relative Revocation,* 33 HARV. L. REV. 337 (1920). Other discussions are found in ATKINSON, *supra* note 5; 2 W. PAGE, THE LAW OF WILLS §§ 21.57 to -.65 (Bowe-Parker ed. 1960); Cornish, *Dependent Relative Revocation,* 5 S. CAL. L. REV. 273 (1932); Evans, *Testamentary Revocation by Act to the Document and Dependent Relative Revocation,* 23 KY. L.J. 559 (1935). In his article, Professor Warren indicates that the term dependent relative revocation is inaccurate, and that "revocation under mistake" would be preferrable. Warren, *supra* at 356.

[10]For a brief discussion *see* Cornish, *Dependent Relative Revocation, supra* note 9, at 273 n.2.

[11]Briscoe v. Allison, 200 Tenn. 115, 290 S.W.2d 864, 866 (1956).

[12]Hungerford v. Nosworthy, 1 Eng. Rep. 99 (H.L. 1694).

[13]Prior to the Statute of Frauds, revocation could be made orally. The Statute of Frauds, 29 Car. 2, c. 3, § 6 (1677) provided that:

> [N]o devise in writing of any lands, tenements or hereditaments, nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling,

there was no revocation. In the 1717 case of *Onions v. Tyrer*,[14] the court held that a later will which had not been properly attested did not revoke an earlier will even though the earlier will had been destroyed and the later will contained an express revocation clause. The court found the destruction to be an act produced by mistake. By the end of the 18th century the English courts had formulated the following rules for the revocation of wills: (1) that an uncompleted later will is not an effective revocation of an earlier will;[15] (2) that a will is not effective as a revocation without proper attestation,[16] even though the later will contains an express clause revoking all prior wills;[17] and (3) that if the testator destroys an earlier will thinking it to be revoked, the mistaken belief can be shown and there is no revocation.[18] Early American cases generally refused to apply the doctrine of dependent relative revocation although an 1842 American case held that the revocatory effect of a will is dependent upon the will's validity and a revocation cannot stand or be considered separately from an ineffective instrument wherein it is contained.[19] But later, Mississippi[20] and Pennsylvania[21] held that where

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tearing or obliterating the same by the testator himself, or in his presence and by his direction and consent.

The statutes which have been adopted by the states have followed very closely the English Statute of Frauds. *See In re* Grattan's Estate, 157 Kan. 116, 138 P.2d 497 (1943). The Statute of Frauds § 6 was adopted in Mississippi in HUTCH. CODE § 15 at 649, Act of 1821. Garret v. Dabney, 27 Miss. 335 (1854).

[14]23 Eng. Rep. 1085, 24 Eng. Rep. 418 (Ch. 1716).

[15]Jekyll v. Jekyll, 161 Eng. Rep. 155 (Eccl. 1753); Limbery v. Hyde, 161 Eng. Rep. 156 n.(a) (Eccl. 1731).

[16]Eccleston v. Petty, 90 Eng. Rep. 650 (K.B. 1689).

[17]Onions v. Tyrer, 23 Eng. Rep. 1085, 24 Eng. Rep. 418 (Ch. 1716).

[18]*Id. See* Cornish, *supra* note 9, at 277-78.

[19]Barksdale v. Barksdale, 39 Va. (12 Leigh) 536 (1842). The holding appears to mean that the validity of a revocation within a subsequent will may be influenced by matters outside the will that have an adverse impact on the ability of the will to effectively devise. Thus the validity of the revocation is dependent on the effectiveness of the will. *See id.* at 542.

[20]Hairston v. Hairston, 30 Miss. 276, 302-03 (1855) (a later inconsistent will with an express clause of revocation). This case provided a construction of MISS. CODE ANN. § 658 (1956):

> A devise so made, or any clause thereof, shall not be revocable but by the testator or testatrix destroying, canceling, or obliterating the same, or causing it to be done in his or her presence, or by a subsequent will, codicil, or declaration, in writing, made and executed. . . .

MISS. CODE ANN. § 658 (1956).

The court recognized the doctrine of dependent relative revocation but held that while acts of destruction might be only prima facie evidence of intent to revoke, an express clause of revocation is conclusive. 30 Miss. at 305-06. Also, the court said the validity of the revocation is not affected by matters *dehors* the will, although such matters may prevent the will from being effective. *Id.* at 302-03. Apparently the revocation and the will in which it is contained are to be treated as independent of one another. *See id. But see* Barksdale v. Barksdale, 39 Va. (12 Leigh) 536 (1842); Onions v. Tyrer, 23 Eng. Rep. 1085, 24 Eng. Rep. 418 (Ch. 1716). In holding the

there is an express revocation clause the prior will is revoked regardless of the later will's inability to devise. It did not appear that the doctrine of dependent relative revocation would develop to cover cases where there was an express revocation by subsequent will, although a few cases foretold of such an expansion.[22] In 1945 the California Supreme Court applied the doctrine to overcome an express revocation principally because the devise in the subsequent will was identical to that in the prior will.[23] The doctrine of dependent relative revocation was originally used principally in cases of revocation by physical destruction of the former will, but presently there is widespread use of the doctrine in the United States in cases of revocation by subsequent instrument.[24] Most states recognize revocation by subsequent instrument[25] and have statutes governing such.[26] Where there is an express clause of revocation, some state courts have indicated that the clause governs.[27] The controlling statute in

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revocation conclusive the court further stated that a revoked will could not be revived. This conceptual problem deterred application of the doctrine of dependent relative revocation. 30 Miss. at 303. The case was later cited with approval in Vining v. Hall, 40 Miss. 83, 107 (1866).

[21]Price v. Maxwell, 28 Pa. 23 (1857) (a later consistent devise but with an express clause of revocation).

[22]*See, e.g.*, Security Co. v. Snow, 70 Conn. 288, 39 A. 153 (1898); *In re* Watt's Estate, 168 Pa. 422, 32 A. 42 (1895).

[23]*In re* Kaufman's Estate, 25 Cal. 2d 854, 155 P.2d 831 (1945). The court held that:

> . . . [I]t is clear that the first will was revoked only because the second duplicated its purpose and that the testator would have preferred the first will to intestacy as to a substantial part of his estate. When a testator repeats the same dispositive plan in a new will revocation of the old one by the new is deemed inseparable related to and dependent upon the legal effectiveness of the new.

[24]Linkins v. Protestant Episcopal Cathedral Foundation, 187 F.2d 357 (D.C. Cir. 1950); *In re* Kaufman's Estate, 25 Cal. 2d 854, 155 P.2d 831 (1945).

[25]Every state except Tennessee has a statutory provision controlling revocation by subsequent instrument.

[26]*E.g., Alabama,* ALA. CODE tit. 61, § 26 (1958); *California,* CAL. PROB. CODE § 74(1) (West 1956); *Florida,* FLA. STAT. ANN. § 731.13 (1964); *Georgia,* GA. CODE ANN. § 113-403 (1959); *Louisiana,* LA. CIV. CODE ANN. art. 1692 (1952); *Mississippi,* MISS. CODE ANN. § 658 (1956); *New York,* N.Y. EST. POWERS & TRUSTS LAW § 3-4.1 (McKinney Supp. 1973). For a listing of all state statutes, *see* Rees, *American Wills Statutes: II,* 46 VA. L. REV. 856, 875-80 (1960). These statutes generally provide that there can be revocation by subsequent instrument only if the later will is executed with the formalities required for any written will. *See* Evans, *Testamentary Revocation by Subsequent Instrument,* 22 KY. L.J. 469 (1934).

[27]*California, In re* Pence's Estate, 117 Cal. App. 323, 4 P.2d 202 (Dist. Ct. App. 1931). *But see In re* Kaufman's Estate, 25 Cal. 2d 854, 155 P.2d 831 (1945). *Connecticut,* Blakeman v. Sears, 74 Conn. 516, 51 A. 517 (1902). *But see* La Croix v. Senecal, 140 Conn. 311, 99 A.2d 115 (1953). *Florida, In re* Pratt's Estate, 88 So. 2d 499 (Fla. 1956). *But see* Stewart v. Johnson, 142 Fla. 425, 194 So. 869 (1940). *Georgia,* Barksdale v. Hopkins, 23 Ga. 332 (1857); *Indiana,* Burns v. Travis, 117 Ind. 44, 18 N.E. 45 (1888); *Kentucky,* Wallingford's Ex'r v. Wallingford's Adm'r., 266 Ky.

Mississippi[28] was held in *Hairston v. Hairston*[29] to have the effect of making express revocation clauses determinative and of not allowing dependent relative revocation to alter any will containing such a clause. Although evidence outside the instrument is admissible where there is cancellation or obliteration of the prior will and no revocation clause in the later will,[30] such a clause has been held in Mississippi to be an unequivocal revocation of all former wills, thus prohibiting dependent relative revocation.

In the instant case the court held that since the bequest to appellee, medical foundation, was made within 90 days of testator's death, the bequest was void, even though less than one-third of the estate was so devised. The court further held that an identical bequest in the former will could not be revived by dependent relative revocation since the second will expressly revoked the first. The court acknowledged the soundness of the doctrine in proper cases[31] but stated that it would be unwarranted and possibly harmful to go beneath the language of the will in the instant case.[32] Based mainly upon *Hairston,* the court noted that

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723, 99 S.W.2d 729 (1936). *But cf.* Carpenter v. Wynn, 252 Ky. 543, 67 S.W.2d 688 (1934). *Michigan,* Dudley v. Gates, 124 Mich. 440, 83 N.W. 97 (1900), *aff'd on rehearing,* 128 Mich. 630, 86 N.W. 959 (1901); *Minnesota,* County Comm'rs v. Scott, 88 Minn. 386, 93 N.W. 109 (1903); *Mississippi,* Hairston v. Hairston, 30 Miss. 276 (1855); *New Jersey,* McGill v. Trust Co., 94 N.J. Eq. 657, 121 A. 760, *modified,* 96 N.J. Eq. 331, 125 A. 108 (1923); *New York,* Ely v. Megie, 219 N.Y. 112, 113 N.E. 800 (1916). *But see In re* Smith's Will, 254 N.Y. 283, 172 N.E. 499 (1930). *North Carolina,* Gossett v. Weatherly, 58 N.C. (5 Jones Eq.) 46 (1859); *Ohio,* Newman v. Newman, 199 N.E.2d 904 (Ohio 1964); *Pennsylvania, In re* Hartman's Estate, 320 Pa. 321, 182 A. 234 (1936). *But see In re* Watt's Estate, 168 Pa. 422, 32 A. 42 (1895). *Wisconsin, In re* Estate of Eberhardt, 1 Wis. 2d 439, 85 N.W.2d 483 (1957).

As noted in Palmer, *Dependent Relative Revocation and its Relation to Relief for Mistake,* 69 MICH. L. REV. 989, 1001 (1971), courts are more reluctant to apply the doctrine of dependent relative revocation in cases where there is an express revocation clause. The article attributes this reluctance to an unwillingness to " 'speculate on whom (the testator) might wish to confer the benefit,' " *quoting from* Tupper v. Tupper, 69 Eng. Rep. 627, 629 (Ch. 1855).

[28]MISS. CODE ANN. § 658 (1956). In Livelar v. Arnold, 233 So. 2d 760 (Miss. 1970) the court held that the revocation of wills was governed by this section of the code.

[29]30 Miss. 276 (1855); *accord,* Vining v. Hall, 40 Miss. 83 (1866). Mississippi also holds that a later will with terms inconsistent with the first is effective as a revocation even without an express revocation clause. Crawford v. Crawford, 225 Miss. 208, 82 So. 2d 823 (1955); Klein v. Gaines, 203 Miss. 871, 34 So. 2d. 488 (1948); Holcomb v. Holcomb, 173 Miss. 192, 159 So. 564 (1935).

[30]Wilbourn v. Shell, 59 Miss. 205 (1881).

[31]Citing the opinion in Wilbourn v. Shell, 59 Miss. 205 (1881).

[32]The court cited *In re* Pratt's Estate, 88 So. 2d 499, 503 (Fla. 1956), including that court's citation of Warren, *supra* note 9, at 348-49:

> A will cannot be set aside for mistake in either the United States or in England where the testator knew and approved its contents. By the same token a revocation absolute on its face which the testator knows and approves, will not be set aside because the reasons which induced it are found to be on false assumptions of fact or law. The testator is dead, and it is too dangerous

its ruling was consistent with other courts' decisions[33] and with the Mississippi statute governing the area.[34]

In a lengthy dissent, Judge Sugg[35] contended that the majority had defeated the testator's clear intention to bequest part of his estate to the medical foundation. The dissent distinguished *Hairston*, the principal case relied upon by the majority, on the ground that the later will in *Hairston* contained a devise which was inconsistent with the earlier will,[36] whereas in the instant case Item III in the former will reappeared identically in the later will. For this reason Judge Sugg believed outside evidence, *e.g.*, Item III of the earlier will, should have been admitted to establish the testator's intent.

In its desire to formulate consistent case law the court in the instant case violated its principal duty[37] in the interpretation of wills and reached what can only be considered an inequitable decision.[38] The court's responsibility in probating a will is to effectuate as nearly as possible the intention of the testator. In the present case the testator did not intend to revoke Item III of the earlier will but sought to carry over

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to inquire what motives induced his action. This was to be done for the construction of the document; it should not be resorted to for the alteration of it.

[33]Citing *Florida, In re* Pratt's Estate, 88 So. 2d 499 (Fla. 1956); *Georgia,* Cash v. Cash, 212 Ga. 416, 93 S.E.2d 346 (1956); *New York,* Ely v. Megie, 219 N.Y. 112, 113 N.E. 800 (1916); *Ohio,* Newman v. Newman, 199 N.E.2d 904 (Ohio 1964); *Pennsylvania, In re* Hartman's Estate, 320 Pa. 321, 182 A. 234 (1936); *Tennessee,* Briscoe v. Allison, 200 Tenn. 115, 290 S.W.2d 864 (1956); *Wisconsin, In re* Estate of Eberhardt, 1 Wis. 2d 439, 85 N.W.2d 483 (1957).

[34]The court stated that its interpretation of Miss. Code Ann. § 648 (1956), had become codified, evidenced by the Mississippi legislature's verbatim retention of the statute, and that any alteration of *Hairston* must come from legislative amendment and not judicial reversal.

[35]Joined by Judges Patterson, Robertson and Walker.

[36]In *Hairston* the initial will named the testator's nephew, son and grandson as legatees. In a later invalid will revoking the earlier will, the testator altered the devise so that his entire estate was to go to one of his slaves.

[37]Mississippi School for Blind v. Armstrong, 216 Miss. 348, 62 So. 2d 369 (1953) states:

> We must bear in mind two principles which are well established in our jurisprudence governing the construction of wills. One is that the prime inquiry is the intention of the testatrix and when this has been ascertained all minor, subordinate and technical rules of construction must yield to this paramount intent.

Id. at 355, 62 So. 2d at 371 (dissenting opinion). *Accord,* Carlisle v. Carlisle, 233 So. 2d 803 (Miss. 1970); New Orleans Baptist Theological Seminary v. Lacy, 219 So. 2d 665 (Miss. 1969); *In re* Loeb's Will, 206 So. 2d 615 (Miss. 1968); *In re* King's Estate, 203 So. 2d 581 (Miss. 1967).

[38]"Equity looks to the intent, and will regard substance rather than form." V. Griffith, Mississippi Chancery Practice § 39, at 41 (2d ed. 1950). *See* Commander v. Brazil, 88 Miss. 668, 41 So. 497 (1906); Davis v. Pearson, 44 Miss. 508 (1870).

the bequest set out in Item III, while altering other provisions of the earlier will. Notwithstanding the clear intention of the testator, the court, through a strict construction of the Mortmain Statute,[39] disallowed the bequest to the medical foundation. Yet the policy of the statute appears irrelevant in this case. Where a testator makes an original devise more than 90 days prior to his death, it works no new hardship on his family for the testator to renew the bequest within the 90 days. Further, such a repeated devise cannot be interpreted to mean that the testator was exploited during his weakness since the medical foundation gained no more from the testator than it would have under the original bequest.

The court stated that its interpretation of the area, as set out in *Hairston,* has been codified[40] and that any change must come from legislative and not judicial sources. But it is arguable that since this "codification" is of judicial origin, then the judiciary should have the power to alter its own decisions. By holding that an express revocation clause prohibits examination of any documents or circumstances outside the revoking instrument, the court perpetuates a rigid constructional approach generally rejected by modern law.[41] Although the weight of authority in the United States would indicate that the revocatory clause is absolute, there are sound cases holding otherwise.[42] Rather than restricting itself to a distinguishable case in the interest

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[39]MISS. CONST. art. 14, § 270.

[40]The fact that the statute has been adopted verbatim in every Mississippi code is hardly conclusive of an adoption of this particular interpretation. The Mississippi Legislature does not keep every judicial decision in mind when acting on a statute. To the contrary, the history of this statute indicates a "rubber stamp" action with little thought as to the actual effect which the statue has exerted or will exert.

[41]*See generally In re* Estate of Kosek, 31 N.Y.2d 475, 294 N.E.2d 188, 191, 341 N.Y.S.2d 593, 597 (1973) which states:

> To determine the meaning of a particular testamentary provision, it is necessary to look, first, to the testator's intention. This, we have said, is to be "gleaned not from a single word or phrase but from a sympathetic reading of the will as an entirety and in view of all the facts and circumstances under which the provisions of the will were framed."

Citing Matter of Fabbri, 2 N.Y.2d 236, 240, 140 N.E.2d 269, 271, 159 N.Y.S.2d 184, 187 (1957). *Accord,* Mississippi School for Blind v. Armstrong, 216 Miss. 348, 62 So. 2d 369 (1953); *In re* Raworth's Estate, 211 Miss. 780, 52 So. 2d 661 (1951).

[42]*See, e.g.,* Linkins v. Protestant Episcopal Cathedral Foundation, 187 F.2d 357 (D.C. Cir. 1950); *In re* Kaufman's Estate, 25 Cal. 2d 854, 155 P.2d 831 (1945); La Croix v. Senecal, 140 Conn. 311, 99 A.2d 115 (1953); Ruth v. Ruth, 35 Del. Ch. 573, 123 A.2d 132 (1956); Stewart v. Johnson, 142 Fla. 425, 194 So. 869 (1940); Charleston Library Soc'y v. Citizens & S. Nat'l Bank, 200 S.C. 96, 20 S.E.2d 623 (1942).

> Recent cases have applied the doctrine of dependent relative revocation where there was an express revocation of charitable devises, and identical devises in the second will failed because the testator did not survive for the statutory period after execution of the will. Here of course there was neither actual condition nor mistake but we can feel sure that in the circumstances the testator would not have wished his first devise to be revoked.

T. ATKINSON, THE LAW OF WILLS § 88, at 462 (2d ed. 1953).

of stare decisis, the court should have upheld the intention of the testator.[43] A different holding would not have violated the law, but would have been an equitable and reasonable decision consistent with modern American jurisprudence.

Charles Claiborne Barksdale

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[43]*See* 3 A. Scott, Trusts § 362.4, at 2826-27 (3rd ed. 1967). *See also In re* Watt's Estate, 168 Pa. 422, 32 A. 42 (1895).

BOOK REVIEW

SWEATSHOPS IN THE SUN by RONALD B. TAYLOR
Boston: Beacon Press. 1973. Pp. 288. $6.95

*Paul R. Rice**

To say that the life of migrant farm workers is difficult would be to understate the obvious. But it is. And their plight is incessant.

They are required to do strenuous work for long periods at a time, in dangerously unhealthy conditions, with no job security, few health services, little protection from unscrupulous employers and little hope for the future.

Some have rallied to their cause, but for a variety of reasons have been unsuccessful. There have been studies of their plight by Congress and startling exposés over the past several decades, but reform has remained a promise of the reformers. The United Farm Workers Union under Cesar Chavez, which has been in the forefront of recent reform movements, has been hampered to the point of paralysis by the opposition of growers and nationally organized labor movements and by the failure of Congress to move authoritatively.

It would be unfair to suggest that some improvements have not been made. However, vis-a-vis the problems to be attacked, these reforms have been little more than tokenism at best.

Realistically, the best that might be hoped is that the migrant farm children will realize the reforms that have been promised for so long. However, as explained by Ronald B. Taylor in his recent book *Sweatshops in the Sun: Child Labor on the Farm,* this hope may be little more than fuel for more disallusionment if the public's consciousness and understanding is not increased and movement made toward realistic solutions.

Most attempts to extricate these children from the poverty cycle into which they were born center around their education. However, these attempts are constantly being defeated by the movement of their families from one agricultural region to another as they "follow the crops." Even when they are not being moved, the children are frequently kept from school by their parents who need their hands in the fields so that survival wages can be earned. Without an education the cycle will be perpetuated —assuming, of course, that the children survive the perils of an occupation which ranks only behind mining and construction in dangerousness. With the use of chemical poisons and machines, large numbers of people, mostly children, are killed or maimed each year.

Migrant farm people are poor to the point of literal destitution. Consequently, it is their condition that prevents them from revolting against their condition. They must accept the work that is available, at

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the paltry wages which the growers are willing to pay, since without them they cannot survive. They cannot rebel against the utterly despicable conditions in which they are compelled to live and work since protest means unemployment. Poverty makes them do whatever is necessary to survive. In short, it is their poverty that begets their poverty.

In a very short fashion *Sweatshops in the Sun* says a great deal about migrant farm people and more specifically about the particular plight of their children. Unlike other books of its kind, however, it is not intended to be an emotional exposé. Indeed, if it were, it would fail. All of the problems and reasons offered for the continued existence of those problems have been discussed many times in the past by other writers. The uniqueness of Mr. Taylor's book is in his synopsis of the present problems of all migrant workers throughout the United States, his objective and unemotional discussion of those problems in terms of their particular impact on the children, and his constant focus on individuals rather than cold statistics (although the book is factually and statistically well-documented).

Too frequently we tend to romanticize about the life on the farm and the value which the hard work it entails holds for children. Such romanticization is a favored ploy of the advocates of these child "sweatshops," and, as pointed out by Mr. Taylor, it often amounts to little more than a callous effort to mask the fact that we would rather sacrifice a child to preserve a low-cost, high-profit-yield meal on the American table.

Clearly, to save the migrant farm children from the lifelong hardships suffered by their parents, they must be taken from the fields and educated. However, school attendance should not be ensured through the active enforcement of existing laws against child labor. This would only place greater economic hardships on the migrant families which ultimately would result in the children being deprived of food and other essentials. The answer lies in increased wages for the workers who, with adequate incomes, would gladly send their children to school.

To achieve these economic gains, Mr. Taylor suggests that Congress "legislatively clear the way" for a concerted effort by both the farmer and farm worker on their own behalf. Presently, farm labor is exempt from most state and federal labor legislation. Consequently, it is difficult for the workers to get the growers to bargain with them collectively and in good faith. Therefore Mr. Taylor suggests that a "federally structured commission—similar to the Public Utilities Commission—could be designed to regulate the public interest in the source and supply of food. . . . Such a commission could guarantee fair collective bargaining and favorable profit margins by exercising control over the excess profiteering at any level. . . ."

The merits of Mr. Taylor's proposal must be left to the evaluation of someone more qualified than this writer. However, it is clear that this or other proposed changes will be made only through a concerted pressure by those who have power and influence—the voters and consumers. *Sweatshops in the Sun* will contribute to the development of the public consciousness and understanding that is necessary for this pressure for change to spawn.

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